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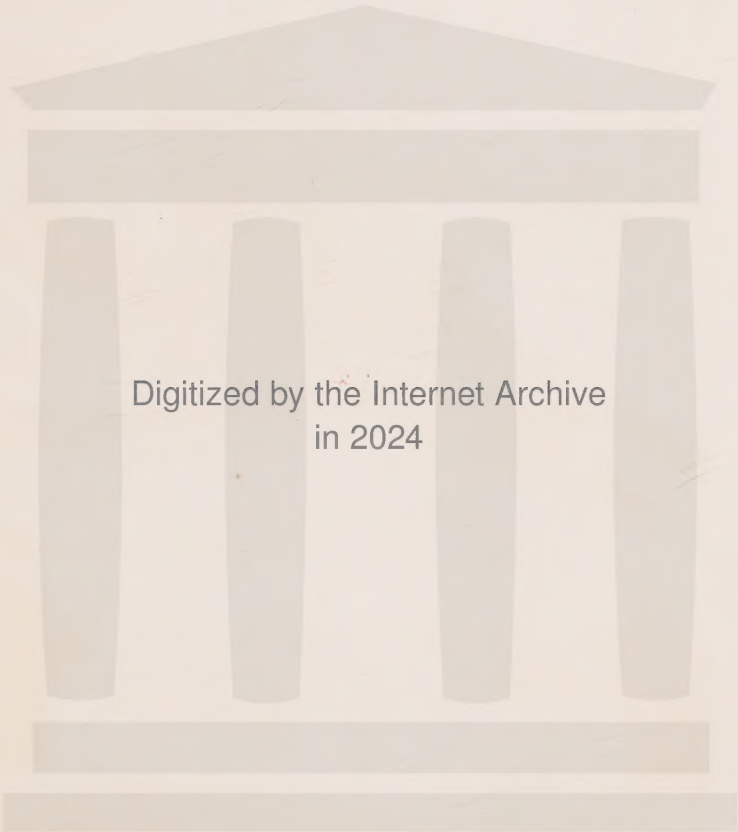
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THE CONSTITUTIONAL DECISIONS

OF

JOHN MARSHALL

EDITED, WITH AN INTRODUCTORY ESSAY

BY

JOSEPH P. COTTON, JR.

OF THE NEW YORK BAR

IN TWO VOLUMES

VOL. II.

G. P. PUTNAM'S SONS

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Johnson and Graham's Lessee

v.

M'Intosh.

NOTE.

THIS case, while not dealing with any specific provision of the Constitution, is of interest in that it establishes the constitutional power of the United States to dispose of all vacant lands, not within any state, free of any Indian titles or rights of ownership. The case arose on a controversy as to the title to certain lands in Illinois. The plaintiffs showed a title from the Illinois Indians who were at the time of the grant (1875), and long had been, in undisputed possession and enjoyment of the lands in question. The lands were, however, within the limits of the colony of Virginia which, after the Revolution, ceded its rights to its western Territory, including these lands, to the United States, which, in its turn, granted the land to the defendants. The case arose on an agreed statement setting out these facts, from which it appeared that neither party had obtained absolute possession of the lands until the time of the controversy. Judgment was given for the defendant in the District Court of Illinois and on error came before the Supreme Court.

Marshall's opinion sets out, with great vigor and clearness, the doctrine of rights by conquest to the territory of the conquered, the course of the title of the British Crown to its American possessions, and the succession of the United States to that title. The case is clear and unquestioned law, and the decision was, perhaps, inevitable; it is, however, remarkable for its freedom from petty palliation for the hardships of conquest, the virility of its statement, and its breadth of view.

Johnson and Graham's Lessee

v.

William M'Intosh.

[8 Wheaton, 543.]

1823.

The case was argued by Mr. Harper and Mr. Webster for the plaintiffs, and by Mr. Winder and Mr. Murray for the defendants.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain * Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognized in the courts of the United States?

*572

The facts as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give,

and of private individuals to receive, a title which can be sustained in the courts of this country.

As the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an * ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid

*573

conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

*574 * In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental

principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. How-
*575 ever * conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the

immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery. The letters patent granted to the Sieur Demonts, in 1603, constitute him Lieutenant-General, and the representative of the King in Acadie, which is described as stretching from the fortieth to the forty-sixth degree of north latitude; with authority to extend the power of the French over that country, and its inhabitants; to give laws to the people; to treat with the natives, and enforce the observance of treaties, and to parcel out and give title to lands, according to his own judgment.

The states of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the forty-third degree of north latitude; and this country they claimed under the title acquired by this voyage. Their *first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the States-General made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands.

*576

The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that

title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to all Christian people"; and of these countries Cabot was empowered to take possession in the name of the King of England, thus asserting a right
*577 to take possession, * notwithstanding the occupancy of the natives, who were heathens, and at the same time admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognized. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen and barbarous lands as were not actually possessed by any Christian prince or

people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to Sir Thomas Gates and others, those territories in America lying on the sea-coast, between the thirty-fourth and forty-fifth degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first, or southern colony, was directed to settle between the thirty-fourth and forty-first degrees of north latitude; and the second, or northern colony, between the thirty-eighth and forty-fifth degrees.

In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the King granted to the "Treasurer and Company of Adventurers of the city of London for the first Colony in Virginia," in absolute property, the lands extending along the sea-coast four hundred miles, and *into the land throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the Court of King's Bench on a writ of *quo warranto;* but the whole effect allowed to this judgment was to revest in the crown the powers of government, and the title to the land within its limits.

*578

At the solicitation of those who held under the grant to the second or northern colony, a new and more enlarged charter was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the fortieth and forty-eighth degrees of north latitude.

Under this patent, New England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers.

Great part of New England was granted by this company, which, at length, divided their remaining lands among themselves; and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

All the grants made by the Plymouth Company, so far as we can learn, have been respected. In pursuance of the same principle, the King, in 1664, granted to the Duke of York the country of New England as far south as the Delaware * Bay.
*579 His Royal Highness transferred New Jersey to Lord Berkeley and Sir George Carteret.

In 1663, the crown granted to Lord Clarendon and others, the country lying between the thirty-sixth degree of north latitude and the river St. Mathes; and, in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the

King's dominions in North America which lies from thirty-six degrees thirty minutes north latitude to the twenty-ninth degree, and from the Atlantic Ocean to the South Sea.

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the King claimed and exercised the right of granting lands, and of dismembering the government at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never *been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

*580

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to con-

vey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721 a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The King, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil.

*581 That * title was respected till the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognized, will be found in the history of the wars, negotiations and treaties which the dif-ent nations, claiming territory in America, have carried on and held with each other.

The contests between the cabinets of Versailles

and Madrid, respecting the territory on the northern coast of the Gulf of Mexico, were fierce and bloody, and continued until the establishment of a Bourbon on the throne of Spain produced such amicable dispositions in the two crowns as to suspend or terminate them.

Between France and Great Britain, whose discoveries as well as settlements were nearly contemporaneous, contests for the country, actually covered by the Indians, began as soon as their settlements approached each other, and were continued until finally settled in the year 1763, by the treaty of Paris.

Each nation had granted and partially settled the country, denominated by the French, Acadie, and by the English, Nova Scotia. By the twelfth article of the treaty of Utrecht, made in 1703, His Most Christian Majesty ceded to the Queen of Great Britain, "all Nova Scotia or Acadie, with its ancient boundaries." A great part of the ceded territory was in the possession of the Indians, and the extent of the cession could not be adjusted by the commissioners to whom it was to be referred.

The treaty of Aix la Chapelle, which was made
*582 *on the principle of the *status ante bellum*, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments, in favor of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining in the possession of Indians.

After the termination of this fruitless discussion, the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New England, Nova Scotia, and that part of Canada which adjoined those colonies, but embraced our whole western country also. France contended not only that the St. Lawrence was to be considered as the center of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops, in a war with some southern Indians.

This river was comprehended in the chartered limits of Virginia; but, though the right of England to a reasonable extent of country, in virtue of her discovery of the sea-coast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific Ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognized by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She therefore sought to strengthen her original title to *the lands in controversy, by insisting that it had been acknowledged by France in the fifteenth article of the treaty of Utrecht. The dispute respecting the construction of that article has no tendency to impair the principle that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right

*583

of occupancy neither controverted, and neither had then extinguished.

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guarantied to Great Britain all Nova Scotia, or Acadie, and Canada, with their dependencies; and it was agreed that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians would have been considered * and treated as an invasion of the territories of France.

*584

By the twentieth article of the same treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or southeast of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians.

By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, it was occupied chiefly by the Indians.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It * has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.

*585

Virginia, particularly, within whose chartered limits

the land in controversy lay, passed an act in the year 1779, declaring her "exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase, formerly for the use and benefit of the colony, and lately for the commonwealth." The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained that the exclusive right to purchase from the Indians resided in the government.

In pursuance of the same idea, Virginia proceeded, at the same session, to open her land office, **586* * for the sale of that country which now constitutes Kentucky—a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The states, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on con-

ditions expressed in their deeds of cession, which demonstrate the opinion that they ceded the soil as well as jurisdiction, and that in doing so they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations which could only be made by the owners of the soil; and concluded with a stipulation that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c., "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

*587 * After these states became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the active occupation of Indians.

The magnificent purchase of Louisiana was the purchase from France of a country almost entirely

occupied by numerous tribes of Indians, who are in fact independent. Yet any attempt of others to intrude into that country would be considered as an aggression which would justify war.

Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions recognize and elucidate the principle which has been received as the foundation of all European title in America. The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The va-

*588 lidity of the titles given by either has never *been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute must be an exclusive title, or at least a title which excludes all

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others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword.

*589 The title * to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if

not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, * or
*590 safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and

whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturalists became unfit for them. The game fled *into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately through its grantees or deputies.

*591

The law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be * adapted to the actual condition of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

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This question is not entirely new in this court. The case of *Fletcher* v. *Peck* grew out of a sale made by the state of Georgia of a large tract of country within the limits of that state, the grant of which was afterwards resumed. The action was brought by a

sub-purchaser, on the contract of sale, and one of the covenants in the deed was, that the state of Georgia was, at the time of sale, seized in fee of the premises. The real question presented by the issue was, whether the seisin in fee was in the state of Georgia, or in the United States. After stating that this controversy between the several states and the United States had been compromised, the court thought it necessary to notice the Indian title, which, although entitled to the respect of all courts until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seisin in fee on the part of the state.

This opinion conforms precisely to the principle which has been supposed to be recognized by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee than a lease for years, and might as effectually bar an ejectment.

Another view has been taken of this question, *which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages,

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so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our courts could distinguished from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a court to say that different consequences are attached to this purchase, because it was made by a stranger.

*594 By the treaties concluded * between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they

had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made is to set up their title against that of the United States.

The proclamation issued by the King of Great Britain, in 1763, has been considered, and we think with reason, as constituting an additional objection to the title of the plaintiffs.

By that proclamation, the crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west," and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands.

It has been contended that, in this proclamation, the King transcended his constitutional powers; and the case of *Campbell* v. *Hall* (reported by Cowper) is relied on to support this position.

*595 *It is supposed to be a principle of universal law that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connection with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The

title of the whole land is in the whole society. It is to be divided and parceled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.

If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as *impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A

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title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the King, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the King, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the King had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required that means should be adopted for *the preservation of peace, and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

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In the case of *Campbell* against *Hall*, that part of

the proclamation was determined to be illegal which imposed a tax on a conquered province, after a government had been bestowed upon it. The correctness of this decision cannot be questioned, but its application to the case at the bar cannot be admitted. Since the expulsion of the Stuart family, the power of imposing taxes, by proclamation, has never been claimed as a branch of regal prerogative; but the powers of granting, or refusing to grant, vacant lands, and of restraining encroachments on the Indians, have always been asserted and admitted.

The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts.

In the argument of this cause, the counsel for the plaintiffs have relied very much on the opinions expressed by men holding offices of trust, and on various proceedings in America, to sustain titles to land derived from the Indians.

The collection of claims to lands lying in the western country, made in the first volume of the Laws of the United States, has been referred to; but we find nothing in that collection to support the argument. Most of the titles were derived *from persons professing to act under the authority of the government existing at the time; and the two grants under which the plaintiffs claim are supposed, by the person under whose inspection the collection was made, to be void because forbidden by the royal proclamation of 1763. It is not un-

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worthy of remark that the usual mode adopted by the Indians for granting lands to individuals has been to reserve them in the treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated. The practice, in such case, to grant to the crown, for the use of the individual, is some evidence of a general understanding that the validity even of such a grant depended on its receiving the royal sanction.

The controversy between the colony of Connecticut and the Mohegan Indians, depended on the nature and extent of a grant made by those Indians, to the colony; on the nature and extent of the reservations made by the Indians in their several deeds and treaties, which were alleged to be recognized by the legitimate authority, and on the violation by the colony of rights thus reserved and secured. We do not perceive, in that case, any assertion of the principle that individuals might obtain a complete and valid title from the Indians.

It has been stated, that in the memorial transmitted from the cabinet of London to that of Versailles, during the controversy between the two nations respecting boundary, which took place in 1755, the Indian right to the soil is recognized. *But this recognition was made with reference to their character as Indians, and for the purpose of showing that they were fixed to a particular territory. It was made for the purpose of sustaining the claim of His Britannic Majesty to dominion over them.

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The opinion of the Attorney and Solicitor-Gen-

eral, Pratt and Yorke, have been adduced to prove, that in the opinion of those great law officers, the Indian grant could convey a title to the soil without a patent emanating from the crown. The opinion of those persons would certainly be of great authority on such a question, and we were not a little surprised, when it was read, at the doctrine it seemed to advance. An opinion so contrary to the whole practice of the crown, and to the uniform opinions given on all other occasions by its great law officers, ought to be very explicit, and accompanied by the circumstances under which it was given and to which it was applied, before we can be assured that it is properly understood. In a pamphlet, written for the purpose of asserting the Indian title, styled "Plain Facts," the same opinion is quoted, and is said to relate to purchases made in the East Indies. It is, of course, entirely inapplicable to purchases made in America. Chalmers, in whose collection this opinion is found, does not say to whom it applies; but there is reason to believe, that the author of "Plain Facts" is, in this respect, correct. The opinion commences thus: "In respect to such places as have been, or shall be acquired, by treaty or grant, from any of the Indian princes or governments, your *majesty's letters patent are not necessary." The words "princes or governments" are usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chiefmen, their nations or tribes, not of their "princes or governments." The question on

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which the opinion was given, too, and to which it relates, was whether the King's subjects carry with them the common law wherever they may form settlements. The opinion is given with a view to this point, and its object must be kept in mind while construing its expressions.

Much reliance is also placed on the fact that many tracts are now held in the United States under the Indian title, the validity of which is not questioned.

Before the importance attached to this fact is conceded, the circumstances under which such grants were obtained, and such titles are supported, ought to be considered. These lands lie chiefly in the eastern states. It is known that the Plymouth Company made many extensive grants, which, from their ignorance of the country, interfered with each other. It is also known that Mason, to whom New Hampshire, and Gorges, to whom Maine was granted, found great difficulty in managing such unwieldy property. The country was settled by emigrants, some from Europe, but chiefly from Massachusetts, who took possession of lands they found unoccupied, and secured themselves in that possession by the best means in their power. The disturbances in

*601 *England, and the civil war and revolution which followed those disturbances, prevented any interference on the part of the mother country, and the proprietors were unable to maintain their title. In the meantime, Massachusetts claimed the country and governed it. As her claim was adversary to that of the proprietors, she encouraged the

settlement of persons made under her authority, and encouraged, likewise, their securing themselves in possession, by purchasing the acquiescence and forbearance of the Indians.

After the restoration of Charles II., Gorges and Mason, when they attempted to establish their title, found themselves opposed by men, who held under Massachusetts and under the Indians. The title of the proprietors was resisted; and though, in some cases, compromises were made, and in some, the opinion of a court was given ultimately in their favor, the juries found uniformly against them. They became wearied with the struggle, and sold their property. The titles held under the Indians were sanctioned by length of possession; but there is no case, so far as we are informed, of a judicial decision in their favor.

Much reliance has also been placed on a recital contained in the charter of Rhode Island, and on a letter addressed to the governors of the neighboring colonies by the King's command, in which some expressions are inserted, indicating the royal approbation of titles acquired from the Indians.

The charter to Rhode Island recites "that the said John Clark, and others, had transplanted *themselves into the midst of the Indian nations, and were seized and possessed, by purchase and consent of the said natives, to their full content, of such lands," &c. And the letter recites that "Thomas Chifflinch, and others, having, in the right of Major Asperton, a just propriety in the Narragansett country, in New England, by grants from

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the native princes of that country, and being desirous to improve it into an English colony," &c., "are yet daily disturbed."

The impression this language might make, if viewed apart from the circumstances under which it was employed, will be effaced, when considered in connection with those circumstances.

In the year 1635, the Plymouth Company surrendered their charter to the crown. About the same time, the religious dissensions of Massachusetts expelled from that colony several societies of individuals, one of which settled in Rhode Island, on lands purchased from the Indians. They were not within the chartered limits of Massachusetts, and the English government was too much occupied at home to bestow its attention on this subject. There existed no authority to arrest their settlement of the country. If they obtained the Indian title, there were none to assert the title of the crown. Under these circumstances, the settlement became considerable. Individuals acquired separate property in lands which they cultivated and improved; a government was established among themselves; and no power existed in America which could rightfully interfere with it.

On the restoration of Charles II., this small society
*603 *hastened to acknowledge his authority, and to solicit his confirmation of their title to the soil, and to jurisdiction over the country. Their solicitations were successful, and a charter was granted to them, containing the recital which has been mentioned.

It is obvious that this transaction can amount to no acknowledgment that the Indian grant could convey a title paramount to that of the crown, or could, in itself, constitute a complete title. On the contrary, the charter of the crown was considered as indispensable to its completion.

It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. The object of the crown was to settle the seacoast of America; and when a portion of it was settled, without violating the rights of others, by persons professing their loyalty, and soliciting the royal sanction of an act, the consequences of which were ascertained to be beneficial, it would have been as unwise as ungracious to expel them from their habitations because they had obtained the Indian title otherwise than through the agency of government. The very grant of a charter is an assertion of the title of the crown, and its words convey the same idea. The country granted is said to be "our island called Rhode Island"; and the charter contains an actual grant of the soil, as well as of the powers of government.

*604 *The letter was written a few months before the charter was issued, apparently at the request of the agents of the intended colony, for the sole purpose of preventing the trespasses of neighbors, who were disposed to claim some authority

over them. The King, being willing himself to ratify and confirm their title, was, of course, inclined to quiet them in their possession.

This charter, and this letter, certainly sanction a previous unauthorized purchase from Indians, under the circumstances attending that particular purchase, but are far from supporting the general proposition that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown.

The acts of the several colonial assemblies, prohibiting purchases from the Indians, have also been relied on, as proving that, independent of such prohibitions, Indian deeds would be valid. But we think this fact, at most, equivocal. While the existence of such purchases would justify their prohibition, even by colonies which considered Indian deeds as previously invalid, the fact that such acts have been generally passed, is strong evidence of the general opinion that such purchases are opposed by the soundest principles of wisdom and national policy.

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the court is decidedly of opinion that the plaintiffs do not exhibit a title which can *be sustained in the courts of the United States, and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

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Judgment affirmed with costs.

Gibbons *v.* Ogden.

NOTE.

The facts of this case were, substantially, that the State of New York, by special acts, granted to Robert R. Livingston and Robert Fulton the exclusive right to the use of steam as a power for navigating boats in New York waters for a term of years. These rights passed by assignment to the complainant, Ogden. The defendant, Gibbons, employed two steamboats to run from New York to Elizabethtown (New Jersey). These two boats were duly licensed under the Act of Congress (passed February 18, 1793) providing for United States licenses for boats engaged in the coasting trade. The complainant Ogden's application for an injunction, on the ground that the rights given by the New York special acts were being infringed, was granted by the New York Courts and the case was then carried to the Supreme Court on appeal. The facts above stated appear from the pleadings.

Gibbons v. *Ogden* may properly be deemed the leading case on the powers granted by the commerce clause, because it asserted the great principle that the power of the federal government over commerce was absolutely supreme. The doctrine that such power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution" (9 Wheaton, 196), and that such power "is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States" (9 Wheaton, 197), has been repeatedly affirmed by the Supreme Court in every case in which the question has arisen; and in the late case, *Northern Securities Company et al.* v. *The United States*, 187, U. S., 1, has been again clearly enunciated.

But the doctrine of *Gibbons* v. *Ogden* that the power of Congress over commerce excludes the possibility of an existence of a concurrent power in the States, even if the power of Congress has not been exercised, though that doctrine has commanded the nominal adherence of the Court, has not proved an entirely workable doctrine. On that point *Gibbons* v. *Ogden* did not settle or finally expound the law (see introduction).

And in the course of his opinion Marshall went farther and construed the acts of Congress giving coasting licenses to the steamboats here in question as a positive regulation of commerce by Congress with which the New York grant came in conflict. If that is the correct construction of the coasting license acts, there can be no question of the soundness of the decision of the case; but as an original question the dissenting opinion of Mr. Justice Johnson on this point (printed *infra* as a footnote at the end of Marshall's opinion) seems more sound. The fairest criticism of Marshall's opinion in *Gibbons* v. *Ogden* seems to be that in it Marshall stated principles which have formed the basis of the later attempts of the Supreme Court to expound the national power over commerce—that most difficult department of American constitutional law. The case is considered at length in the introduction to these volumes.

Gibbons

v.

Ogden.

[9 Wheaton, 186.]

1824.

Mr. Webster and the Attorney-General, Mr. Wirt, for the appellant.
Mr. Oakley, Mr. Emmett for the respondent.

Mr. Chief Justice MARSHALL delivered the opinion of the Court, and after stating the case, proceeded as follows:

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant:

1st. To that clause in the constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The state of New York maintains the constitutionality of these laws; and their legislature, their Council of Revision, and their judges have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to con-

sideration that virtue, intelligence, and office, can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this Court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United
*187 *States expect from this department of the government.

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be

construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in *the constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be

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expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects

*189 *for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of

enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial *intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

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If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution

was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the constitution, comprehends navigation *also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

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It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another,

in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing that all America is united *in that construction which comprehends navigation in the word *commerce*. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

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That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such a case, an embargo is no more a war measure, than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war.

By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility, will not be imputed to those who were arrayed in opposition *to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

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The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be *carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

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If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention *been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

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But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams

which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear, when *196 *applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation, on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between

New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the *questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

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The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner,

connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that although the power of Congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally *exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

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The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have

drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised *by the states, *199 are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power

by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress,
*200 *and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question, whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states, while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the tenth section, as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor of the existence of that power, and that the section which prohibits the

states from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the state was competent, may still be made.

That this restriction shows the opinion of the convention, that a state might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence, *from this concession, that a state may regulate commerce, with foreign nations and among the states, cannot be admitted. * 201

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts and excises"; and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive and distinct from each other; and so places them in the enumeration it contains. The power of

imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states *to levy taxes, not from the questionable power to regulate commerce.

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"A duty of tonnage" is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also. This tax may be imposed by a state, with the consent of Congress; and it may be admitted that Congress cannot give a right to a state, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the state from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussion which preceded the war of

our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

These restrictions, then, are on the taxing power, *not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

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But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution, as being passed in the exercise of a power remaining with the states.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The objects of inspection laws is to improve the quality of the articles produced by the labor of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepared it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states

themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the * power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged power; that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the

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same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to distinguish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose
* 205 * action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of Congress, passed in 1796 and 1799,[1] empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a state, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgement that a state may

[1] 2 U. S. L., p. 545; 3 U. S. L., p. 126.

rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might * interfere with, and be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But in making these provisions, the opinion is unequivocally manifested, that Congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce.

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The act passed in 1803,[1] prohibiting the importation of slaves into any state which shall itself prohibit their importation, implies, it is said, an admission that the states possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

[1] 3 U. S. L., p. 529.

If this inference were correct; if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself, it might now be exercised. Any state might now import African slaves into its own territory. But it is obvious that the power of the states over this subject, previous to the year 1808, constitutes an exception to the power of * Congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the states to admit or exclude, for a limited period. The words are: "The migration or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." The whole object of the exception is to preserve the power to those states which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the constitution, cannot be admitted to prove the possession of any other similar power.

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It has been said that the act of August 7th, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and, hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations, and amongst the states. But this inference is not, we think, justified by the fact.

Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made * in future, presupposes the right in the maker to legislate on the subject.

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The act unquestionably manifests an intention to leave this subject entirely to the states, until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only "until further

legislative provision shall be made by Congress," shows, conclusively, an opinion that Congress could control the whole subject, and might adopt the system of the states, or provide one of its own.

A state, it is said, or even a private citizen, may construct light-houses. But gentlemen must be aware, that if this proves a power in a state to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, *erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.

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These acts were cited at the bar for the purpose of showing an opinion in Congress that the states possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the states. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the states retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire

result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether
*210 *of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

This opinion has been frequently expressed in this court, and is founded as well on the nature of the

government as on the words of the constitution. In argument, however, it has been contended that if a law, passed by a state in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, * inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme ; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

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In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to Congress the power to regulate it.

In the exercise of this power, Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur, that, when a legislature
*212 *attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone, if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a state is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the state of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress; but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state. To the court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain or other vessels enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment, that the vessels it describes shall *213 *be entitled to the privileges of ships or vessels employed in the coasting trade. Those privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are "license is hereby granted for the said steamboat, *Bellona*, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself.

The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to *him all the right which the grantor can transfer, to do what is within the terms of the license.

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Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be—a legislative authority to the steamboat *Bellona*, "to be employed in carrying on the coasting trade, for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel

engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade; and that its sole purpose is to confer the American character.

The answer given to this argument, that the American character is conferred by the enrollment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade, corresponds precisely with the registration of vessels *designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards; and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do; that is, to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade.

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But, if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers;

and this is no part of that commerce which Congress may regulate.

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine as one em-

*216 ployed *in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar, rests on the foundation that the power of Congress does not extend to navigation, as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by

reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section which restrains Congress from prohibiting the migration or importation of such persons as any of the states may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally *to the regulation of vessels employed in transporting men, who pass from place to place voluntarily and to those who pass involuntarily.

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If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally, must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America,

consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, sections twenty-three and forty-six, contains provisions respecting passengers, and shows that vessels which transport them, have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the process of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally; and, on the 2d of March, 1819, passed "an act regulating passenger ships and * vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government, to the Department of State, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress (if, indeed, any evidence to that point could be required), that the pre-existing regulations comprehended passenger ships among others; and, in prescribing the same duties, the legislature must have considered them as possessing the same rights.

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If, then, it were even true, that the *Bellona* and the

Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question, in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the * United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the state court. The bill does not complain that the *Bellona* and the *Stoudinger* carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers, only, that they were employed in the coasting trade, and

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insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of Congress, for the regulation of commerce, do not look to the
*220 *principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him

who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know, that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest by the act al-
*221 ready * mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were

wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers Congress to promote the progress of science and the useful arts.

The court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear, is imputable to *a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come, depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

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Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass,

and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

DISSENTING OPINION BY JUSTICE JOHNSON.

Mr. Justice JOHNSON. The judgment entered by the court in this cause has my entire approbation; but having adopted my conclusions on views
*223 of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have, also, another inducement. In questions of great importance and great delicacy, I feel my duty to the public best discharged by an effort to maintain my opinions in my own way.

In attempts to construe the constitution, I have never found much benefit resulting from the inquiry, whether the whole, or any part of it, is to be construed strictly, or literally. The simple, classical, precise, yet comprehensive language in which it is couched, leaves, at most, but very little latitude for construction; and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended. The great and paramount purpose, was to unite this mass of wealth and power, for the protection of the humblest individual; his rights,

civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means. But the principal of those means, one so essential as to approach nearer the characteristics of an end, was the independence and harmony of the states, that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic.

The strong sympathies, rather than the feeble government, which bound the states together during a common war, dissolved on the return of peace; and the very principles which gave rise to the war of the revolution, began to threaten the *confederacy with anarchy and ruin. The states
*224 had resisted a tax imposed by the parent state, and now reluctantly submitted to, or altogether rejected, the moderate demands of the confederation. Everyone recollects the painful and threatening discussions which arose on the subject of the five per cent. duty. Some states rejected it altogether; others insisted on collecting it themselves; scarcely any acquiesced without reservations, which deprived it altogether of the character of a national measure; and, at length, some repealed the laws by which they had signified their acquiescence.

For a century the states had submitted, with murmurs, to the commercial restrictions imposed by the parent state; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the states, and fatal to their commercial interests abroad.

This was the immediate cause that led to the forming of a convention.

As early as 1778, the subject had been pressed upon the attention of Congress, by a memorial from the state of New Jersey; and in 1781, we find a reso-
lution presented to that body, by one of *the most enlightened
*225 men of his day, affirming that "it is indispensably necessary that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every state, that none may take place that shall be partial or contrary to the common interests." The resolution of Virginia, appointing her commissioners, to meet commissioners from other states, expresses their purpose to be, "to take into consideration the trade of the United States, to consider how far an uniform system, in their commercial regulations, may be necessary to their common interests and their permanent harmony." And Mr. Madison's resolution, which led to that measure, is introduced by a preamble entirely explicit to this point: "Whereas, The relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing

animosities, which cannot fail to arise among the several states, from the interference of partial and separate regulations," &c., "therefore, resolved," &c.

The history of the times will, therefore, sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those *evils, could be only commensurate with the power of the states over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people, when the grant was made.

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There was not a state in the Union in which there did not, at that time, exist a variety of commercial regulations, concerning which it is too much to suppose that the whole ground covered by those regulations was immediately assumed by actual legislation, under the authority of the Union. But where was the existing statute on this subject, that a state attempted to execute? or by what state was it ever thought necessary to repeal those statutes? By common consent, those laws dropped lifeless from their statute-books, for want of the sustaining power, that had been relinquished to Congress.

And the plain and direct import of the words of the grant is consistent with this general understanding.

The words of the constitution are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It is not material, in my view of the subject, to inquire whether the article *a* or *the* should be prefixed to the word "power." Either, or neither, will produce the same result; if either, it is clear that the article "the" would be the proper one, since the next preceding grant of power is certainly exclusive, to wit, "to borrow money on the credit *of the United States." But mere verbal criticism I reject.

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My opinion is founded on the application of the words of the grant to the subject of it.

The "power to regulate commerce," here meant to be granted, was that power to regulate commerce which previously existed in the states. But what was that power? The states were, unquestionably, supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign state. The definition and limits of that power are to be sought among the features of international law; and, as it was not only admitted, but insisted on by both parties, in argument, that, "unaffected by a state of war, by treaties, or by municipal regulations, all commerce among independent states was legitimate," there is no necessity to appeal to the oracles of the *jus commune* for the correctness of that doctrine. The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows

that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the state to act upon.

*228 And such has been the practical construction of *the act. Were every law on the subject of commerce repealed to-morrow, all commerce would be lawful; and, in practice, merchants never inquire what is permitted, but what is forbidden commerce. Of all the endless variety of branches of foreign commerce, now carried on to every quarter of the world, I know of no one that is permitted by act of Congress, any otherwise than by not being forbidden. No statute of the United States, that I know of, was ever passed to permit a commerce, unless in consequence of its having been prohibited by some previous statute.

I speak not here of the treaty-making power, for that is not exercised under the grant now under consideration. I confine my observation to laws properly so called. And even where freedom of commercial intercourse is made a subject of stipulation in a treaty, it is generally with a view to the removal of some previous restriction; or the introduction of some new privilege, most frequently, is identified with the return to a state of peace. But another view of the subject leads directly to the same conclusion. Power to regulate foreign commerce is given in the same words, and in the same breath, as it were, with that over the commerce of the states and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive. The states are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be

*229 *held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

But the language which grants the power as to one description of commerce, grants it as to all; and, in fact, if ever the exercise of a right, or acquiescence in a construction, could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

A right over the subject has never been pretended to in any instance, except as incidental to the exercise of some other unquestionable power.

The present is an instance of the assertion of that kind, as incidental to a municipal power; that of superintending the internal concerns of a state, and particularly of extending protection and patronage, in the shape of a monopoly, to genius and enterprise.

The grant to Livingston and Fulton interferes with the freedom of intercourse among the states; and on this principle its constitutionality is contested.

When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence.

Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into com-
*230 merce; the subject, *the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to regulate commerce.

That such was the understanding of the framers of the constitution, is conspicuous from provisions contained in that instrument.

The first clause of the 9th section not only considers the right of controlling personal ingress or migration, as implied in the powers previously vested in Congress over commerce, but acknowledges it as a legitimate subject of revenue. And, although the leading object of this section undoubtedly was the importation of slaves, yet the words are obviously calculated to comprise persons of all descriptions, and to recognize in Congress a power to prohibit where the states permit, although they cannot permit when the states prohibit. The treaty-making power undoubtedly goes further. So the fifth clause of the same section furnishes an exposition of the sense of the convention as to the power of Congress over navigation: "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another."

But it is almost laboring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption, and continued exercise of the power, and universal acquiescence, have so clearly
*231 established *the right of Congress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. As to the transportation of passengers, and passengers in a steamboat, I consider it as having been solemnly recognized by the State of New York, as a subject both of commercial regulations and of revenue. She has imposed a transit duty upon steam passengers arriving at Albany, and unless this be done in the exercise of her control over personal intercourse, as incident to internal commerce, I know not on what principle the individual has been subjected to this tax. The subsequent imposition upon the steamboat itself, appears to be but a commutation, and operates as an indirect instead of a direct tax upon the same subject. The passenger pays it at last.

It is impossible, with the views which I entertained of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was

repealed to-morrow, the rights of the appellant to a reversal of the decision complained of, would be as *strong as it is under this license.
*232 One-half the doubts in life arise from the defects of language, and if this instrument had been called an exemption instead of a license, it would have given a better idea of its character. Licensing acts, in fact, in legislation, are universally restraining acts; as, for example, acts licensing gaming houses, retailers of spiritous liquors, &c. The act, in this instance, is distinctly of that character, and forms part of an extensive system, the object of which is to encourage American shipping; and place them on an equal footing with the shipping of other nations. Almost every commercial nation reserves to its own subjects a monopoly of its coasting trade; and a countervailing privilege in favor of American shipping is contemplated, in the whole legislation of the United States on this subject. It is not to give the vessel an American character, that the license is granted; that effect has been correctly attributed to the act of her enrollment. But it is to confer on her American privileges, as contradistinguished from foreign; and to preserve the government from fraud by foreigners, in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected. Many duties and formalities are necessarily imposed upon the American foreign commerce, which would be burdensome in the active coasting trade of the states, and can be dispensed with. A higher rate of tonnage also is imposed, and this license entitles the vessels that take it, to those exemptions, but to nothing more. *A common register,
*233 equally entitles vessels to carry on the coasting trade, although it does not exempt them from the forms of foreign commerce, or from compliance with the 16th and 17th sections of the enrolling act. And even a foreign vessel may be employed coastwise, upon complying with the requisitions of the 24th section. I consider the license, therefore, as nothing more than what it purports to be, according to the 1st section of this act, conferring on the licensed vessel certain privileges in that trade, not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all.

Yet there is one view in which the license may be allowed considerable influence in sustaining the decision of this court.

It has been contended that the grants of power to the United States over any subject, do not, necessarily, paralyze the arm of the states, or deprive them of the capacity to act on the same subject. That this can be the effect only of prohibitory provisions in their own constitutions, or in that of the general government. The *vis vitæ* of power is still existing in the states, if not extinguished by the constitution of the United States. That, although as to all those grants of power which may be called aboriginal, with relation to the government, brought into existence by the constitution, they, of course, are out of the reach of state power; yet, as to all concessions of powers which previously existed in the states it was otherwise. The practice of our government cer-

*234 tainly * has been, on many subjects, to occupy so much only of the field opened to them as they think the public interests require. Witness the jurisdiction of the circuit courts, limited both as to cases and as to amount; and various other instances that might be cited. But the license furnishes a full answer to this objection; for, although one grant of power over commerce should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the states must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence. So far as relates to the commerce coastwise, the act under which this license is granted contains a full expression of Congress on this subject. Vessels, from five tons upwards, carrying on the coasting trade, are made the subject of regulation by that act. And this license proves that this vessel has complied with that act, and been regularly ingrafted into one class of the commercial marine of the country.

It remains to consider the objections to this opinion, as presented by the counsel for the appellee. On those which had relation to the particular character of this boat, whether as a steamboat or a ferry-boat, I have only to remark, that in both those characters, she is expressly recognized as an object of the provisions which relate to licenses.

The 12th section of the act of 1793 has these words: "That when the master of any ship or vessel, ferry-boats excepted, shall be changed," &c. And the

*235 act which exempts licensed steamboats * from the provisions against alien interests, shows such boats to be both objects of the licensing act, and objects of that act, when employed exclusively within our bays and rivers.

But the principal objections to these opinions arise, 1st. From the unavoidable action of some of the municipal powers of the states, upon commercial subjects. 2d. From passages in the constitution which are supposed to imply a concurrent power in the states in regulating commerce.

It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. The different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision. As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities, for which, by the consent of mankind, a compensation is paid, upon the same principle that the whole commercial world submit to pay light-money to the Danes. Inspection laws

*236 are of a more equivocal nature, and it is obvious that * the constitution has viewed that subject with much solicitude. But so far

from sustaining an inference in favor of the power of the states over commerce, I cannot but think that the guarded provisions of the 10th section, on this subject, furnish a strong argument against that inference. It was obvious that inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the states, for obvious reasons, an absolute control is given over state legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. The inferences, to be correctly drawn, from this whole article, appear to me to be altogether in favor of the exclusive grants to Congress of power over commerce, and the reverse of that which the appellee contends for.

This section contains the positive restrictions imposed by the constitution upon state power. The first clause of it specifies those powers which the states are precluded from exercising, even though the Congress were to permit them. The second, those which the states may exercise with the consent of Congress. And here the sedulous attention to the subject of state exclusion from commercial power is strongly marked. Not satisfied with the express grant to the United States of the power over commerce, this clause negatives the exercise of that power to the states, as to the only two objects which could ever tempt them to assume the exercise of that power, to wit, the collection of a revenue from imposts and duties on imports and exports; or from a tonnage duty. As *to imposts on imports or exports, such a revenue *237 might have been aimed at directly, by express legislation, or indirectly, in the form of inspection laws; and it became necessary to guard against both. Hence, first, the consent of Congress to such imposts or duties is made necessary; and as to inspection laws, it is limited to the minimum of expenses. Then, the money so raised shall be paid into the treasury of the United States, or may be sued for, since it is declared to be for their use. And lastly, all such laws may be modified, or repealed, by an act of Congress. It is impossible for a right to be more guarded. As to a tonnage duty, that could be recovered in but one way; and a sum so raised, being obviously necessary for the execution of health laws, and other unavoidable port expenses, it was intended that it should go into the state treasuries; and nothing more was required, therefore, than the consent of Congress. But this whole clause, as to these two subjects, appears to have been introduced *ex abundanti cautela*, to remove every temptation to an attempt to interfere with the powers of Congress over commerce, and to show how far Congress might consent to permit the states to exercise that power. Beyond those limits, even by the consent of Congress, they could not exercise it. And thus we have the whole effect of the clause. The inference which counsel would deduce from it, is neither necessary nor consistent with the general purpose of the clause.

But instances have been insisted on, with much confidence, in argument, in which, by municipal *laws, particular regulations respecting their *238 cargoes have been imposed upon shipping in the ports of the United States; and one, in which forfeiture was made the penalty of disobedience.

Until such laws have been tested by exceptions to their constitutionality the argument certainly wants much of the force attributed to it; but admitting their constitutionality, they present only the familiar case of punishment inflicted by both governments upon the same individual. He who robs the mail, may also steal the horse that carries it, and would, unquestionably, be subject to punishment, at the same time, under the laws of the state in which the crime is committed, and under those of the United States. And these punishments may interfere, and one render it impossible to inflict the other, and yet the two governments would be acting under powers that have no claim to identity.

It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto, the only remedy has been applied which the case admits of—that of a frank and candid co-operation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the states, and to aid in enforcing their health laws; that which surrenders to the states the superintendence of pilotage, and the *many laws passed to permit a tonnage duty to be levied for the use of their ports. Other instances could be cited, abundantly to prove that collision must be sought to be produced; and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers.

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I have not touched upon the right of the states to grant patents for inventions or improvements, generally, because it does not necessarily arise in this cause. It is enough for all the purposes of this decision, if they cannot exercise it so as to restrain a free intercourse among the states.

Osborn *v.* Bank of the United States.

NOTE.

THE history of the controversy that arose on the chartering of the new Bank of the United States in 1816 is briefly stated in the note preceding the case of *McCulloch* v. *Maryland* (*supra*, I., 302) and the facts that led up to the case are there set out. The Ohio statute of 1819, which was declared unconstitutional in this case, aimed to drive the branch banks of the United States out of Ohio by providing a tax of $50,000 on each office of discount and deposit of any bank doing business in the State without permission of the State. The act itself recited that the operations of the Bank of the United States were contrary to Ohio law. In 1819 Osborn, the auditor of Ohio, acting under this statute, seized $100,000 belonging to the Bank of the United States, and the money was paid over to the State Treasurer. Several abortive legal attempts were made to recover the money, and it was not until 1824 that the case reached the Supreme Court; in the meantime the Ohio Legislature had officially and in terms denied the power of the Supreme Court to pass finally on constitutional questions concerning the states, and had passed further legislation to harass the Bank.

At the outset of the case objection was made that the Court had not jurisdiction, and that point was twice argued and a preliminary opinion given. The first Bank, under Marshall's decision in *Bank of the United States* v. *Deveaux*, 5 Cranch, 61 (and *supra*, I., 207), had no express authority to sue in the federal courts, but that defect had been remedied in the act creating the new Bank. It was then objected that the power was unconstitu-

tional because in effect it gave the Supreme Court jurisdiction to decide questions of law which did not in any way arise under the Constitution or federal laws, but Marshall, in answer, laid down the broad, sweeping interpretation that the Constitution gave the Supreme Court complete jurisdiction of every cause in which a federal law was an "ingredient," and hence in every case in which the Bank was a party. The decision settled the law on the point.

A more serious jurisdictional objection urged was that the action was, in effect, against the State of Ohio, and, as an action against a state, was in contravention of the Eleventh Amendment to the Constitution and could not be sustained. To meet this argument Marshall laid down the broad proposition that the question whether an action came within the Eleventh Amendment depended entirely on whether or not the state was on the record a party to the suit. Obviously that doctrine, if the broad statement of it were accepted, practically made waste paper of the Eleventh Amendment. Wise and necessary it may have been, in order to give the Supreme Court real power to check unconstitutional actions by state officers, but certainly it was a construction almost in the teeth of the amendment,—and was curiously typical of Marshall's habit of strict construction against the powers of the states. The case is still law, on its facts, but it was not until *In re Ayers*, 123 U. S., 443, and the cases following it that the doctrine was clearly enunciated that the question as to whether a state was a party of record was not the final test to decide whether the case came within the Eleventh Amendment, that that point was to be decided from the nature of the whole case. But the Ayers case, though it limited *Osborn* v. *Bank*, affirmed the doctrine that the Eleventh Amendment was no defense to a suit against a state officer acting under the authority of an unconstitutional state law ; so far *Osborn* v. *Bank* is still law, but the theory that it set out has been discarded. The significance of the decision on this point of the case has been generally disregarded. With *Cohens* v. *Virginia*, where the Supreme Court summoned a sovereign state before it, with *McCulloch* v. *Maryland*, where the power to deal with a state officer was assumed,

and with this case where the authority of the law of a state was held no bar to an action where the law was unconstitutional, Marshall had practically destroyed the immunity from suit which the Eleventh Amendment had granted. His doctrines have been since accepted and are integral parts of the American system of constitutional law, but simple as they now seem and plain as they were to one of Marshall's political belief in the necessity of limiting the power of the states, they were questions of immense difficulty and of importance second only to the main doctrines of *Marbury* v. *Madison* and *McCulloch* v. *Maryland.*

For the rest *Osborn* v. *Bank* is a reaffirmance, without new emphasis, of the principles of *McCulloch* v. *Maryland.* That those principles were not generally accepted in Marshall's time was clear when in 1832 Jackson vetoed the recharter of the Bank on the ground that it was unconstitutional.

Osborn and others

v.

The President, Directors, and Company of the Bank of the United States.

[9 Wheat. 738.]

1824.

On reargument on the point of jurisdiction, Mr. Clay, Mr. Webster, and Mr. Sergeant argued for the jurisdiction, Mr. Harper, Mr. Brown, and Mr. Wright against it. On the first argument Mr. Hammond and Mr. Wright appeared for the appellants, Mr. Clay for respondents.

Mr. Chief Justice MARSHALL delivered the opinion of the court, and, after stating the case, proceeded as follows:

At the close of the argument a point was suggested of such vital importance as to induce the Court to request that it might be particularly spoken to. That point is, the right of the Bank to sue in the Courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

* 817 * The appellants contest the jurisdiction of the court on two grounds:

1st. That the act of Congress has not given it.

2d. That, under the Constitution, Congress cannot give it.

1. The first part of the objection depends entirely on the language of the act. The words are, that the Bank shall be "made able and capable in law" "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State courts having jurisdiction, and in any Circuit Court of the United States."

These words seem to the Court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued" "in every Circuit Court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this Court in *The Bank of the United States* v. *Deveaux* (5 Cranch, 85). In that case it was decided that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal Courts. The words of the third section of that act are, that the bank may "sue and be sued," etc., "in Courts of record, or any other place whatsoever." The Court was of opinion that these general words, which are used in all acts of incorporation, gave only a general capacity to sue, not
*818 a particular privilege to sue in the *Courts of the United States; and this opinion was strengthened by the circumstance that the ninth rule of the seventh section of the same act subjects the directors, in case of excess in contracting debt, to be

sued, in their private capacity, "in any Court of record of the United States, or either of them." The express grant of jurisdiction to the federal Courts, in this case, was considered as having some influence on the construction of the general words of the third section, which does not mention those Courts. Whether this decision be right or wrong, it amounts only to a declaration that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts. To infer from this that words expressly conferring a right to sue in those courts do not give the right is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it.

2. We will now consider the constitutionality of the clause in the act of incorporation which authorizes the Bank to sue in the federal Courts.

In support of this clause it is said that the legislative, executive, and judicial powers of every well constructed government are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power* of construing every such law. All governments, which are not extremely defective in their organization, must possess within themselves the means of expounding, as well as enforcing, their own laws. If we examine the

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constitution of the United States, we find that its framers kept this great political principle in view. The 2d article vests the whole executive power in the President; and the 3d article declares "that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

The suit of *The Bank of the United States* v. *Osborn and others* is a case, and the question is, whether it arises under a law of the United States?

The appellants contend that it does not, because several questions may arise in it which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from *820 *the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital import-

ance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action, whether his right is barred, whether he has received satisfaction, or has in any manner released his claims, are questions some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the Court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases, in which original jurisdiction is given to this Court, there is none, to which the judicial power extends, from which the original jurisdiction of the inferior Courts is ex*cluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the

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judicial power. We find in the constitution no prohibition to its exercise in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied, in its appellate form only, to the most important class of cases to which it is applicable.

The constitution establishes the Supreme Court and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate that in any such case the power cannot be exercised in its original form by Courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance in the Courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained that Congress is incapable of giving the Circuit Courts original jurisdiction in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some *of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient founda-

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tion for jurisdiction that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction the judicial power of the Union extends effectively and beneficially to that most important class of cases which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has *received that shape which may be given to it by another tribunal into which he is forced against his will.

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We think, then, that when a question, to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the Bank.

When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but
*824 into any Court? This depends on a *law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative,

the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is
*825 * compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract

could never have been made but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

The clause giving the Bank a right to sue in the Circuit Courts of the United States stands on the same principle with the acts authorizing officers of the United States, who sue in their own names, to sue in the Courts of the United States. The Postmaster-General, for example, cannot sue under that part of the constitution which gives jurisdiction to the federal Courts in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. He comes into the Courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the Bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends abso*lutely
*826 on that law, and cannot exist a moment without its authority.

If it be said that a suit brought by the Bank may

depend, in fact, altogether on questions unconnected with any law of the United States, it is equally true with respect to suits brought by the Postmaster-General. The plea in bar may be payment, if the suit be brought on a bond, or *non assumpsit*, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster-General to sue in the Courts of the United States has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the constitution which asserts the right of the Legislature to give original jurisdiction to the Circuit Courts in cases arising under a law of the United States.

The clause in the patent law authorizing suits in the Circuit Courts stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defense exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the Court, or establish the position that the case does not arise under a law of the United States.

It is said that a clear distinction exists between
*827 * the party and the cause; that the party may originate under a law with which the cause has no connexion; and that Congress may, with the

same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the Courts of the United States, as give that right to the Bank.

This distinction is not denied; and if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the Bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the Bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the Bank arises out of this law.

A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the same circumstances under which a native might sue. He is *distinguishable in nothing from a native citizen except so far as the constitution makes the distinction. The law makes none.

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There is, then, no resemblance between the act incorporating the Bank, and the general naturalization law.

Upon the best consideration we have been able to bestow on this subject, we are of opinion that the clause in the act of incorporation, enabling the Bank to sue in the Courts of the United States, is consistent with the constitution, and to be obeyed in all Courts.

We will now proceed to consider the merits of the cause.

The appellants contend, that the decree of the Circuit Court is erroneous :—

1. Because no authority is shown in the record, from the Bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions, sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill, does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because, the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because, the case made in the bill does not
* warrant the interference of a Court of
* 829 Chancery, by injunction.

6. Because, if any case is made in the bill proper for the interference of a Court of Chancery, it is

against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because, the decree assumes that the Bank of the United States is not subject to the taxing power of the State of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

These points will be considered in the order in which they are made.

1. It is admitted that a corporation can only appear by attorney, and it is also admitted, that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted that this authority must be under seal. On the contrary, the principle decided in the cases of the *Bank of Columbia* v. *Patterson*, &c., is supposed to apply to this case, and to show that the seal may be dispensed with. It is, however, unnecessary to pursue this inquiry, since the real question is, whether the non-appearance of the power in the record be error, not whether the power was insufficient in itself.

Natural persons may appear in Court, either by themselves, or by their attorney. But no man has a right to appear as the attorney of another, without the authority of that other. In ordinary cases, the authority must be produced, because there is, in the nature of things, no *prima facie* evidence that one man is in fact the attorney of another. * The case of an attorney at law, an attorney for the purpose of representing another in Court, and prosecuting or defending a suit in his name, is somewhat different.

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The power must indeed exist, but its production has not been considered as indispensable. Certain gentlemen, first licensed by government, are admitted by order of Court, to stand at the bar, with a general capacity to represent all the suitors in the Court. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our Courts, and no departure from it has been made in those of any State, or of the Union.

The argument supposes some distinction, in this particular, between a natural person and a corporation; but the Court can perceive no reason for this distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived why the same evidence should not be required, that the individual professing to represent him has authority to do so, which would be required if he were incapable of appearing in person. The universal and familiar practice, then, of permitting gentlemen of the profession to appear without producing a warrant of attorney, forms a rule, which is as applicable in reason to their appearance for a corporation, as for a natural person. Were it even otherwise, the practice is as
* 831 * uniform and as ancient, with regard to corporations, as to natural persons. No case has ever occurred, so far as we are informed, in which

the production of a warrant of attorney has been supposed a necessary preliminary to the appearance of a corporation, either as plaintiff or defendant, by a gentleman admitted to the bar of the Court. The usage, then, is as full authority for the case of a corporation, as of an individual. If this usage ought to be altered, it should be a rule to operate prospectively, not by the reversal of a decree pronounced in conformity with the general course of the Court, in a case in which no doubt of the legality of the appearance had ever been suggested.

In the statutes of jeofails and amendment, which respect this subject, the non-appearance of a warrant of attorney in the record, has generally been treated as matter of form; and the 32d section of the Judiciary Act may very well be construed to comprehend this formal defect in its general terms, in a case of law. No reason is perceived why the Courts of Chancery should be more rigid in exacting the exhibition of a warrant of attorney than a Court of law; and, since the practice has, in fact, been the same in both Courts, an appellate Court ought, we think, to be governed in both by the same rule.

2. The second point is one on which the productiveness of any decree in favour of the plaintiffs most probably depends; for, if the claim be not satisfied with the money found in the possession of Sullivan, it is, at best, uncertain * whether a fund, out of which it can be satisfied, is to be found elsewhere.

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In inquiring whether the proofs or admissions in

the cause be sufficient to charge Sullivan, the Court will look into the answer of Currie, as well as into that of Sullivan. In objection to this course, it is said, that the answer of one defendant cannot be read against another. This is generally, but not universally, true. Where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule is not admitted to apply. Thus, if an ancestor die, pending a suit, and the proceeding be revived against his heir, or if a suit be revived against an executor or administrator, the answer of the deceased person, or any other evidence, establishing any fact against him, might be read also against the person who succeeds to him. So, a *pendente lite* purchaser is bound by the decree, without being even made a party to the suit; *a fortiori*, he would, if made a party, be bound by the testimony taken against the vendor.

In this case, if Currie received the money taken out of the Bank, and passed it over to Sullivan, the establishment of this fact, in a suit against Currie, would seem to bind his successor, Sullivan, both as a privy in estate, and as a person getting possession *pendente lite*, if the original suit had been instituted against Currie. We can perceive no difference, so far as respects the answer of Currie, between the case supposed, and the case as it stands. If Currie, who was the predecessor of Sullivan, admits that he received the money of the * Bank, the fact seems to bind all those coming in under him, as completely as it binds himself. This, therefore,

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appears to the Court to be a case in which, upon principle, the answer of Currie may be read.

His answer states, that on or about the 19th or 20th of September, 1819, the defendant, Harper, delivered to him, in coin and notes, the sum of 98,000 dollars, which he was informed, and believed to be the money levied on the Bank as a tax, in pursuance of the law of the State of Ohio. After consulting counsel on the question, whether he ought to retain this sum within his individual control, or pass it to the credit of the State on the books of the treasury, he adopted the latter course, but retained it carefully in a trunk, separate from the other funds of the treasury. The money afterwards came to the hands of Sullivan, the gentleman who succeeded him as treasurer, and gave him a receipt for all the money in the treasury, including this, which was still kept separate from the rest.

We think no reasonable doubt can be entertained, but that the 98,000 dollars, delivered by Harper to Currie, were taken out of the Bank. Currie understood and believed it to be the fact. When did he so understand and believe it? At the time when he received the money. And from whom did he derive his understanding and belief? The inference is irresistible, that he derived it from his own knowledge of circumstances, for they were of public notoriety, and from the information of Harper. In the necessary
*834 course of things, Harper, who was sent, as Currie must have known, on this business, brings with *him to the treasurer of the State, a

sum of money, which, by the law, was to be taken out of the Bank, pays him 98,000 dollars thereof, which the treasurer receives and keeps, as being money taken from the Bank, and so enters it on the books of the treasury. In a suit brought against Mr. Currie for this money, by the State of Ohio, if he had failed to account for it, could any person doubt the competency of the testimony to charge him? We think no mind could hesitate in such a case.

Currie, then, being clearly in possession of this money, and clearly liable for it, we are next to look into Sullivan's answer, for the purpose of inquiring whether he admits any facts which show him to be liable also.

Sullivan denies all personal knowledge of the transaction; that is, he was not in office when it took place, and was not present when the money was taken out of the Bank, or when it was delivered to Currie. But when he entered the treasury office, he received this sum of 98,000 dollars, separate from the other money of the treasury, which, he understood from report, and was informed by his predecessor, from whom he received it, was the money taken out of the Bank. This sum has remained untouched ever since, from respect to the injunction awarded by the Court.

We ask, if a rational doubt can remain on this subject.

Mr. Currie, as treasurer of the State of Ohio, receives 98,000 dollars, as being the amount of a

tax imposed by the Legislature of that State on
*835 *the Bank of the United States; enters the same on the books of the treasury; and, the legality of the act by which the money was levied being questioned, puts it in a trunk, and keeps it apart from the other money belonging to the public. He resigns his office, and is succeeded by Mr. Sullivan, to whom he delivers the money, informing him, at the same time, that it is the money raised from the Bank; and Mr. Sullivan continues to keep it apart, and abstains from the use of it, out of respect to an injunction, forbidding him to pay it away, or in any manner to dispose of it. Is it possible to doubt the identity of this money?

Even admitting that the answer of Currie, though establishing his liability as to himself, could not prove even that fact as to Sullivan; the answer of Sullivan is itself sufficient, we think, to charge him. He admits that these 98,000 dollars were delivered to him, as being the money which was taken out of the Bank, and that he so received it; for, he says, he understood this sum was the same as charged in the bill; that his information was from report, and from his predecessor; and that the money has remained untouched, from respect to the injunction. This declaration, then, is a part of the fact. The fact, as admitted in his answer, is not simply that he received 98,000 dollars, but that he received 98,000 dollars, as being the money taken out of the Bank—the money to which the writ of injunction applied.

In a common action between two private indi-

viduals, such an admission would, at least, be sufficient to throw on the defendant the burthen of *836 *proving that the money, which he acknowledges himself to have received and kept as the money of the plaintiff, was not that which it was declared to be on its delivery. A declaration, accompanying the delivery, and constituting a part of it, gives a character to the transaction, and is not to be placed on the same footing with a declaration made by the same person at a different time. The answer of Sullivan, then, is, in the opinion of the Court, sufficient to show that these 98,000 dollars were the specific dollars for which this suit was brought. This sum having come to his possession with full knowledge of the fact, in a separate trunk, unmixed with money, and with notice that an injunction had been awarded respecting it, he would seem to be responsible to the plaintiff for it, unless he can show sufficient matter to discharge himself.

3. The next objection is, to the decree against Osborn and Harper, as to whom the bill was taken for confessed.

The bill charges, that Osborn employed John L. Harper to collect the tax, who proceeded by violence to enter the office of discount and deposit at Chillicothe, and forcibly took therefrom 100,000 dollars in specie and bank notes; and that, at the time of the seizure, Harper well knew, and was duly notified, that an injunction had been allowed, which money was delivered either to Currie or Osborn.

So far as respects Harper and Osborn, these allegations are to be considered as true. If the act of the Legislature of Ohio, and the official *character of Osborn, constitute a defence, neither of these defendants are liable, and the whole decree is erroneous; but if the act be unconstitutional and void, it can be no justification, and both these defendants are to be considered as individuals who are amenable to the laws. Considering them, for the present, in this character, the fact, as made out in the bill, is, that Osborn employed Harper to do an illegal act, and that Harper has done that act; and that they are jointly responsible for it, is supposed to be as well settled as any principle of law whatever.

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We think it unnecessary, in this part of the case, to enter into the inquiry respecting the effect of the injunction. No injunction is necessary to attach responsibility on those who conspire to do an illegal act, which this is, if not justified by the authority under which it was done.

4. The next objection is to the allowance of interest on the coin, which constituted a part of the sum decreed to the complainants. Had the complainants, without the intervention of a Court of equity, resorted to their legal remedy for the injury sustained, their right to principal and interest would have stood on equal ground. The same rule would be adopted in a Court of equity, had the subject been left under the control of the party in possession, while the right was in litigation. But the subject was not left under the control of the party. The Court itself interposed,

and forbade the person, in whose possession the property was, to make any use of it. This order having been obeyed, places the defendant in the same
*838 * situation, so far as respects interest, as if the Court had taken the money into its own custody. The defendant, in obeying the mandate of the Court, becomes its instrument, as entirely as the Clerk of the Court would have been, had the money been placed in his hands. It does not appear reasonable, that a decree which proceeds upon the idea, that the injunction of the Court was valid, ought to direct interest to be paid on the money which that injunction restrained the defendant from using.

5. The fifth objection to the decree is, that the case made in the bill does not warrant the interference of a Court of Chancery.

In examining this question, it is proper that the Court should consider the real case, and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, Auditor of the State of Ohio, to restrain him from executing a law of that State, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, who is a State officer, from performing any official act enjoined by statute; and whether a Court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnishes no

authority or protection to the officer who is about to proceed under it. This must be assumed, because, in the arrangement of his * argument, the counsel who opened the cause, has chosen to reserve that point for the last, and to contend that, though the law be void, no case is made out against the defendants. We suspend, also, the consideration of the question, whether the interest of the State of Ohio, as disclosed in the bill, shows a want of jurisdiction in the Circuit Court, which ought to have arrested its proceedings. That question, too, is reserved by the appellants, and will be subsequently considered. The sole inquiry, for the present, is, whether, stripping the case of these objections, the plaintiffs below were entitled to relief in a Court of equity, against the defendants, and to the protection of an injunction. The appellants expressly waive the extravagant proposition, that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law. The question, then, is reduced to the single inquiry, whether the case is cognizable in a Court of equity. If it is, the decree must be affirmed, so far as it is supported by the evidence in the cause.

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The appellants allege, that the original bill contains no allegation which can justify the application for an injunction, and treat the declarations of Ralph Osborn, the Auditor, that he should execute the law, as the light and frivolous threats of an individual, that he would commit an ordinary trespass. But surely this

is not the point of view in which the application for an injunction is to be considered. The Legislature of Ohio had passed a * law for the avowed pur- *840 pose of expelling the Bank from the State; and had made it the duty of the Auditor to execute it as a ministerial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the Bank of its chartered privileges, so far as they were to be exercised in that State. It must expel the Bank from the State; and this is, we think, a conclusion which the Court might rightfully draw from the law itself. That the declarations of the Auditor would be fulfilled, did not admit of reasonable doubt. It was to be expected, that a person continuing to hold an office, would perform a duty enjoined by his government, which was completely within his power. This duty was to be repeated until the Bank should abandon the exercise of its chartered rights.

To treat this as a common casual trespass, would be to disregard entirely its true character and substantial merits. The application to the Court was, to interpose its writ of injunction, to protect the Bank, not from the casual trespass of an individual, who might not perform the act he threatened, but from the total destruction of its franchise, of its chartered privileges, so far as respected the State of Ohio. It was morally certain, that the Auditor would proceed to execute the law, and it was morally certain, that the effect must be the expulsion of the Bank from the State. An annual charge of 100,000 dollars,

would more than absorb all the advantages of the privilege, and would consequently annul it.

*841 * The appellants admit, that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies, the same remedy ought to be afforded. The interference of the Court in this class of cases, has most frequently been to restrain a person from violating an exclusive privilege, by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the Court rather strengthened than weakened? Had the privilege of the Bank been exclusive, the argument admits that any other person, or company, might have been enjoined, according to the regular course of the Court of Chancery, from using or exercising the same business. Why would such person or company have been enjoined? To prevent a permanent injury from being done to the party entitled to the franchise or privilege; which injury, the appellants say, cannot be estimated in damages. It requires no argument to prove, that the injury is greater, if the whole privilege be destroyed, than if it be divided; and, so far as respects the estimate of damages, although precise accuracy may not be attained, yet a reasonable calculation may be made of the amount of the injury, so as to satisfy the Court and Jury. It will not be pretended,

that, in such a case, an action at law could not be maintained, or that the materials do not exist on which a verdict might be *found and a judgment rendered. But in this, and many other cases of continuing injuries, as in the case of repeated ejectments, a Court of Chancery will interpose. The injury done, by denying to the Bank the exercise of its franchise in the State of Ohio, is as difficult to calculate, as the injury done by participating in an exclusive privilege. The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in Chancery, which prevents its repetition, and protects the privilege. The same conservative principle, which induces the Court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and in many cases of destruction, will, we think, apply to this. Indeed, trespass is destruction, where there is no privity of estate.

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If the State of Ohio could have been made a party defendant, it can scarcely be denied, that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the Court, a suit cannot be sustained against the agents of that party; and cases have been cited, to show that a Court of Chancery will not make a decree, unless all those who are substantially interested, be made parties to the suit.

This is certainly true, where it is in the power

of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself *above the law, be exempt from all judicial process, it would be subversive of the best established principles, to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted, that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connexion with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the Court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing? We put out of view the character of the principal as a sovereign State, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the Court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the Court? The appellants found their distinction on the legal principle, that all trespasses are several as well as joint, without inquiry into the validity of this reason, if true. We

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ask, if it be true? Will it be said, that the action of trespass is the only remedy given for this injury? Can it be denied, that an action on the case, for money had and received to the plaintiff's use, might be maintained? * We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us, for the opinion, that an injunction may not be awarded to restrain the agent, with as much propriety as it might be awarded to restrain the principal could the principal be made a party.

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We think the reason for an injunction is much stronger in the actual, than it would be in the supposed case. In the regular course of things, the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury, would be against the agent only; and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a Court of equity. The injury would, in fact, be irreparable; and the cases are innumerable, in which injunctions are awarded on this ground.

But, were it even to be admitted, that the injunction, in the first instance, was improperly awarded, and that the original bill could not be maintained, that would not, we think, materially affect the case. An amended and supplemental bill, making new parties,

has been filed in the cause, and on that bill, with the proceedings under it, the decree was pronounced. The question is, whether that bill and those proceedings support the decree.

*845 The case they make, is, that the money and * notes of the plaintiffs, in the Circuit Court, have been taken from them without authority, and are in possession of one of the defendants, who keeps them separate and apart from all other money and notes. It is admitted, that this defendant would be liable for the whole amount in an action at law; but it is denied that he is liable in a Court of equity.

We think it a case in which a Court of equity ought to interpose, and that there are several grounds on which its jurisdiction may be placed.

One, which appears to be ample for the purpose, is, that a Court will always interpose, to prevent the transfer of a specific article, which, if transferred, will be lost to the owner. Thus, the holder of negotiable securities, indorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them; because, if negotiated, the maker or indorser must pay them. Thus, too, a transfer of stock will be restrained in favour of a person having the real property in the article. In these cases, the injured party would have his remedy at law; and the probability that this remedy would be adequate, is stronger in the cases put in the books, than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay. But it is the province of a Court of equity, in such cases, to arrest the injury, and prevent

the wrong. The remedy is more beneficial and complete, than the law can give. The money of the
*846 Bank, if mingled with the other * money in the treasury, and put into circulation, would be totally lost to the owners; and the reason for an injunction is, at least, as strong in such a case, as in the case of a negotiable note.

6. We proceed now to the sixth point made by the appellants, which is that, if any case is made in the bill, proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

The bill is brought, it is said, for the purpose of protecting the Bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the Court to restrain the officers of the State from executing the law. It is, then, a controversy between the Bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The process of the Court, though not directed against the State by name, acts directly upon it by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the Court ought not to proceed without making the State a party. If this cannot be done the Court cannot take jurisdiction of the cause.

The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is

admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the
*847 * State was before the Court. But this was not in the power of the Bank. The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the State, and on the property in their hands.

Before we try this question by the constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members, should the objection prevail.

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains that, if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own Courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government.

The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous * penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs; while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

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These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the Bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer, for the performance of his duty, than by the infliction of this penalty on a Bank, which, while carrying on the fiscal operations of the government, is also transacting its

own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power *to restrain him is denied as positively in the one as in the other.

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The distinction between any extreme case and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears when considering the question of jurisdiction; for, if the Courts of the United States cannot rightfully protect the agents, who execute every law authorized by the constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union from the attempts of a particular State to resist the execution of those laws.

The State of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a State, can be sustained against such agent, because they would be substantially against the State itself, in violation of the 11th amendment of the constitution.

That the Courts of the Union cannot entertain a suit brought against a State by an alien, or the citizen of another State, is not to be controverted. Is a suit,

brought against an individual for any cause whatever, a suit against a State, in the sense of the constitution?

*850 *The 11th amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

The words of the constitution, so far as they respect this question, are, "The judicial power shall extend to controversies between two or more States, between a State and citizens of another State, and between a State and foreign states, citizens, or subjects."

A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which "a State shall be a party."

The words of the 11th amendment are, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of a foreign state."

The Bank of the United States contends that, in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

The appellants admit that the jurisdiction of the Court is not ousted by any incidental or consequential

interest which a State may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the State through its officers.

*851 * If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person has been considered as a party who is not made so in the record. But the Court will not review those decisions, because, it is thought, a question, growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument than of the decisions of analogous questions by the Courts of any other country.

Do the provisions, then, of the American constitution, respecting controversies to which a State may be a party, extend, on a fair construction of that instrument, to cases in which the State is not a party on the record?

The first in the enumeration is a controversy between two or more States.

There are not many questions in which a State would be supposed to take a deeper or more immediate interest than in those which decide on the extent of her territory. Yet the constitution, not considering the State as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different States. If each State, in consequence of the influence of a decision on her boundary, had been considered by the framers of the

constitution as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves that the constitution
*852 * does not consider the State as a party in such a case.

Jurisdiction is expressly granted in those cases only where citizens of the same State claim lands under grants of different States. If the claimants be citizens of different States, the Court takes jurisdiction for that reason. Still, the right of the State to grant is the essential point in dispute; and in that point the State is deeply interested. If that interest converts the State into a party, there is an end of the cause; and the constitution will be construed to forbid the Circuit Courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same State.

We are aware that the application of these cases may be denied, because the title of the State comes on incidentally, and the appellants admit the jurisdiction of the Court where its judgment does not act directly upon the property or interests of the State; but we deemed it of some importance to show that the framers of the constitution contemplated the distinction between cases in which a State was interested, and those in which it was a party, and made no provision for a case of interest without being a party on the record.

In cases where a State is a party on the record the question of jurisdiction is decided by inspection. If

jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the constitution given by which this interest * is to be measured? If no rule be given, is it to be settled by the Court? If so, the curious anomaly is presented of a Court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

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The next in enumeration is a controversy between a State and the citizens of another State.

Can this case arise if the State be not a party on the record? If it can, the question recurs, What degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the federal Court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act may, perhaps, depend on circumstances. The officer may retain the amount of the

taxes in his hands, and, on the proceedings of the State against him, may plead, in bar, the judgment of a Court of * competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State in the hands of its officer. And yet the argument admits that the action in such a case would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

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It would be tedious to pursue this part of the inquiry farther, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a State may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But before we review them, we will notice one where the nature of the controversy is in some degree blended with the character of the party.

If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be

brought which affects the interest of a foreign minister, or by which the person of his se*cretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the Court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This Court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers it was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

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In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is "controversies to which the United States shall be a party."

Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

Let us examine this question.

Suits brought by the Postmaster-General are * for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet these suits could not be instituted in the Courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the Court jurisdiction over them, as being cases arising under a law of the United States.

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The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another State, the jurisdiction of the federal Courts could be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record

is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in * no manner affects the jurisdiction of the Court? The plain and obvious answer is, because the jurisdiction of the Court depends not upon this interest, but upon the actual party on the record.

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Were a State to be the sole legatee, it will not, we presume, be alleged that the jurisdiction of the Court, in a suit against the executor, would be more affected by this fact, than by the fact that any other person, not suable in the Courts of the Union, was the sole legatee. Yet, in such a case, the Court would decide directly and immediately on the interest of the State.

This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the 2d section of the 3d article, the Supreme Court could never take original jurisdiction in consequence of an interest in a party not named in the record.

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to

those suits in which a State is a party on the record. The amendment has its full effect if the constitution be construed as it *would have been construed had the jurisdiction of the Court never been extended to suits brought against a State by the citizens of another State, or by aliens.

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The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the State for the money taken out of the Bank was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is to its being enforced against the specific article taken, and by the decree of this Court. But it has been shown, we think, that an action of detinue might be maintained for that article, if the Bank had possessed the means of describing it, and that the interest of the State would not have been an obstacle to the suit of the Bank against the individual in possession of it. The judgment in such a suit might have been enforced had the article been found in possession of the individual defendant. It has been shown that the danger of its being

parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a Court of equity. It was in a * Court of equity alone that the relief would be real, substantial, and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated.

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It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

7. Is that law unconstitutional?

This point was argued with great ability, and decided by this Court, after mature and deliberate consideration, in the case of *M'Culloch* v. *The State of Maryland.* A revision of that opinion has been requested; and many considerations combine to induce a review of it.

The foundation of the argument in favor of the right of a State to tax the Bank is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn

from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and
* 860 the casual circumstance of its being * employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court in the case of *M'Culloch* v. *The State of Maryland* is founded on, and sustained by, the idea that the Bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created, in the form in which it now appears, for national purposes only. It is undoubtedly.

capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavour to distinguish between this trade and its * agency for the public, between its Banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, &c. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

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If there be anything in this distinction, it would tend to show that so much of the act as incorporates the Bank is constitutional, but so much of it as authorizes its Banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a Bank? This question was answered in the case of *M'Culloch* v. *The State of Maryland.* It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the pur-

poses of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject,

*862 * the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a Bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. To tax its faculties, its trade and occupation, is to tax the Bank itself. To destroy or preserve the one is to destroy or preserve the other.

It is urged that Congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual, or company, as well as by a corporation. As this profession or business may be taxed, regulated or restrained when conducted by an individual, it may, likewise, be taxed, regulated or restrained when conducted by a corporation.

The general correctness of these propositions need not be controverted. Their particular application to the question before the Court is alone to be considered. We do not maintain that the corporate character of the Bank exempts its operations from the action of State authority. If an individual were to be endowed with the same fa*culties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the Bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character as national instruments. The business of the Bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

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Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union, to perform the public functions of the Bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the Bank, and not more so. If, instead of the Secre-

tary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor, and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operations of the government, would each State in the Union possess a right to *control these operations? The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative.

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Congress was of opinion that these faculties were necessary to enable the Bank to perform the services which are exacted from it and for which it was created. This was certainly a question proper for the consideration of the national Legislature. But, were it now to undergo revision, who would have the hardihood to say that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government is too obvious for controversy; and who will venture to affirm that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more

fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution.

The appellants admit that, if this faculty be necessary to make the Bank a fit instrument for the purposes of the government, Congress possesses the same power to protect the machine in * this, as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The Court has already stated its conviction that, without this capacity to trade with individuals, the Bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests.

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It is contended that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the Court.

It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control which is said to be

so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty; and yet this protection is not expressed in any act of Congress. It is in*cidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.

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That department has no will, in any case. If the sound construction of the act be that it exempts the trade of the Bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the States, Courts are as much bound to give it that construction as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law.

The appellants rely greatly on the distinction between the Bank and the public institutions, such as the mint or the post-office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in Congress. Not so the directors of the Bank. The connection of the government with the Bank is likened to that with contractors.

* 867 It will not be contended that the directors or * other officers of the Bank are officers of government. But it is contended that, were their resemblance to contractors more perfect than it is, the right of the State to control its operations, if those operations be necessary to its character as a machine employed by the government, cannot be maintained. Can a contractor for supplying a military post with provisions be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the Bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.

If the trade of the Bank be essential to its character, as a machine for the fiscal operations of the government, that trade must be as exempt from State control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine, as well upon the faculty of collecting and transmitting the

money of the nation as on that of discounting the notes of individuals. No distinction is taken between them.

Considering the capacity of carrying on the trade of banking as an important feature in the character of this corporation, which was necessary to make it a fit instrument for the objects for which it was created, the Court adheres to its decision in the case of *M'Culloch* against *The State* * *of Maryland*, and is of opinion that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States made in pursuance of the constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.

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It being, then, shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, and that this suit is not against the State of Ohio within the view of the constitution, the State being no party on the record, the only real question in the cause is, whether the record contains sufficient matter to justify the Court in pronouncing a decree against the defendants? That this question is attended with great difficulty has not been concealed or denied. But when we reflect that the defendants, Osborn and Harper, are incontestably liable for the full amount of the money taken out of the bank; that the

defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the Bank, unless the form of having made an entry on the books of the treasury can countervail the fact that it was, in truth, kept untouched in a trunk by itself, as a deposit, to await * the event of the pending suit respecting it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money having reached the hands of all those to whom it afterwards came, with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury nor put into circulation. Were it to be admitted that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the Court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the Bank had been taken without authority by some of the defendants, and was detained by the only person who was not an original wrong-doer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the Bank to prove the facts which

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are necessary to establish the identity of the property sued for. Under such circumstances we think a Court of equity may afford its aid on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes from putting them into circulation, or a person having the apparent ownership of stock really belonging to another from transferring it. The suit, then, might be as well sustained in a * Court of equity as in a Court of law, and the objection that the interests of the State are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued—of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in *Hoyt* v. *Gelston*, in the case of *The Appollon*, and in the case of *Doddridge's Lessee* v. *Thompson and Wright*, and in many others. An independent foreign sovereign cannot be sued, and does not appear in Court. But a friend of the Court comes in, and, by suggestion, gives it to understand that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff and the possession in the defendant, the inquiry cannot be stopped by the mere

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assertion of title in a sovereign. The Court must proceed to investigate the assertion and examine the title. In the case at bar, the tribunal established by the constitution for the purpose of deciding ultimately, in all cases of this description, had solemnly determined that a State law imposing a tax on the Bank of the United States was unconstitutional and void, before the wrong was committed for which this suit was brought.

We think, then, that there is no error in the de-
*871 *cree of the Circuit Court for the district of Ohio, so far as it directs restitution of the specific sum of 98,000 dollars, which was taken out of the Bank unlawfully, and was in the possession of the defendant, Samuel Sullivan, when the injunction was awarded, in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of 2000 dollars, by the defendants, Ralph Osborne and John L. Harper; but that the same is erroneous, so far as respects the interest on the coin, part of the said 98,000 dollars, it being the opinion of this Court, that, while the parties were restrained by the authority of the Circuit Court from using it, they ought not to be charged with interest. The decree of the Circuit Court for the district of Ohio is affirmed, as to the said sums of 98,000 dollars and 2000 dollars; and reversed, as to the residue.

Bank of the United States

v.

Planters' Bank.

NOTE.

THE main point of this case is identical with the jurisdictional point in *Osborn* v. *Bank*, and is covered by it. The second constitutional argument, that the Eleventh Amendment of the Constitution was to be construed as prohibiting a suit against a corporation in which a State was a stockholder is, to the modern lawyer, the extreme view of the States-rights constructionists, a view that never found place in any of Marshall's opinions. The case has never since been questioned.

The Bank of the United States

v.

The Planters' Bank of Georgia.

[9 Wheaton, 904.]

1824.

The case was argued by the same counsel as in the preceding case of Osborn v. The Bank of the United States.

Mar. 20th, *Mr. Chief Justice* MARSHALL delivered the opinion of the court:

In this case, the petition of the plaintiffs, which, according to the practice of the State of Georgia, is substituted for a declaration, is founded on promissory notes payable to a person named in the notes "*or bearer*," and states that the notes * were "duly transferred assigned, and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified; and that the defendants, in consideration of their liability, assumed," &c.

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The Planters' Bank pleads to the jurisdiction of the Court, and alleges that it is a corporation of which the State of Georgia, and certain individuals, who are citizens of the same State with some of the plaintiffs, are members. The plea also alleges that the persons to

whom the notes mentioned in the petition were made payable were citizens of the State of Georgia, and, therefore, incapable of suing the said Bank in a Circuit Court of the United States; and, being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that Court.

To this plea the plaintiffs demurred, and the defendants joined in demurrer.

On the argument of the demurrer, the Judges were divided on two questions:

1. Whether the averments in the declaration be sufficient in law to give this Court jurisdiction of the cause?

2. Whether, on the pleadings in the same, the plaintiffs be entitled to judgment?

The first question was fully considered by the court in the case of *Osborne* v. *The Bank of the United States*, and it is unnecessary to repeat the reasoning used in that case. We are of opinion that the averments in the declaration are sufficient to give the Court jurisdiction of the cause.

*906 *2d. The second point is understood to involve two questions:

1. Does the circumstance that the State is a corporator bring this cause within the clause in the Constitution which gives jurisdiction to the Supreme Court where a State is a party, or bring it within the 11th amendment?

2. Does the fact that the note is made payable to a citizen of the State of Georgia, or bearer, oust the jurisdiction of the Court?

1. Is the State of Georgia a party defendant in this case? If it is, then the suit, had the 11th amendment never been adopted, must have been brought in the Supreme Court of the United States. Could this Court have entertained jurisdiction in the case?

We think it could not. To have given the Supreme Court original jurisdiction, the State must be plaintiff or defendant as a State, and must, as a State, be a party on the record. A suit against the Planters' Bank of Georgia is no more a suit against the State of Georgia than against any other individual corporator. The State is not a party, that is, an entire party in the cause.

If this suit could not have been brought originally in the Supreme Court, it would be difficult to show that it is within the 11th amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the constitution; and if this case be not one of which the Supreme Court could have taken original jurisdiction, it is not within the amend*ment. This is not, we think, a case in which the character of the defendant gives jurisdiction to the Court. If it did, the suit could be instituted only in the Supreme Court. This suit is not to be sustained because the Planters' Bank is suable in the federal Courts, but because the plaintiff has a right to sue any defendant in that Court who is not withdrawn from its jurisdiction by the constitution or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the in-

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dividual corporators. The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.

It is, we think, a sound principle, that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many States of this Union who have an interest in Banks are not suable even in their own Courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the Bank, and waives all *the privileges of that character. As a member of a corporation a government never exercises its sovereignty. It acts merely as a corporator and exercises no other powers in the management of the affairs of the corporation, than are expressly given by the incorporating act.

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The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to

suits brought by or against the Bank, in the sense of the constitution. So with respect to the present Bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal Courts by the circumstance that the State is a corporator.

2. We proceed next to inquire whether the jurisdiction of the Court is ousted by the circumstance. that the notes on which the suit was instituted were made payable to citizens of the State of Georgia.

Without examining whether in this case the original promise is not to the bearer, the Court will proceed to the more general question, whether the Bank, as indorsee, may maintain a suit against the maker of a note payable to a citizen of * the State. *909 The words of the Judiciary Act, section 11, are, "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

This is a limitation on the jurisdiction conferred by the Judiciary Act. It was apprehended that bonds

and notes given, in the usual course of business, by citizens of the same State to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in the federal Courts. To remove this inconvenience, the act, which gives jurisdiction to the Courts of the Union over suits brought by the citizen of one State against the citizen of another, restrains that jurisdiction, where the suit is brought by an assignee, to cases where the suit might have been sustained, had no assignment been made. But the Bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different State from any of its members, but because its charter confers upon it the right of suing its debtors in a Circuit Court of the United States.

If the Bank could not sue a person who was a citizen of the same State with any one of its members, in the Circuit Court, this disability would defeat the power. There is, probably, not a commercial State in the Union, some of whose citizens * are not members of the Bank of the United States. There is, consequently, scarcely a debt due to the Bank for which a suit could be maintained in a Federal Court, did the jurisdiction of the Court depend on citizenship. A general power to sue in any Circuit Court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one.

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We think, then, that the charter gives to the Bank a right to sue in the Circuit Courts of the United States, without regard to citizenship; and that the certificate on both questions must be in favour of the plaintiff.

Brown *v.* Maryland.

NOTE.

THE exact point of *Brown* v. *Maryland* is that a State has no power to impose a tax on the occupation of importing goods from one State to another or from a foreign country, such a tax being an "impost" forbidden by the Constitution, and also a prohibited regulation of commerce. The opinion is notable as Marshall's contribution to what is perhaps the most perplexing topic of American Constitutional Law, the demarcation of the federal power over commerce and the power of the States over their respective domestic affairs. In *Gibbons* v. *Ogden* (9 Wheaton, 1, and *supra*, II., p. 38) Marshall had laid down the broad proposition that the federal power over commerce was exclusive, and that no power over interstate commerce was reserved to the States. That case, however, dealt with a direct attempt by a State to prohibit a certain form of intercourse in New York waterways—to wit, by steam power; but in *Brown* v. *Maryland* the restraint of commerce, a tax on importers, was less direct, and the question then first arose as to the extent of the power of each State to regulate its domestic affairs when such regulation affected commerce. Marshall determined that the tax in question on the business of importation was so far direct that it was clearly invalid, but in part of his opinion he indicates that a State has the right to make its own health laws and exercise its own "police power," although that exercise might have an indirect effect on commerce. The case does not, however, draw that line between the indirect regulation of commerce which the State may make, and the direct one that it may not. Those direct and indirect restrictions of commerce, as Marshall said in this case, in a slightly different connection, "may yet, like the

intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them." The relation of this case to Marshall's other opinions on the commerce power is discussed at length in the introduction to these volumes. As to so much of the case as deals with the clause of the Constitution forbidding any State to "lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," *Brown* v. *Maryland* has settled the law.

To this case has also been ascribed the paternity of a rather unfortunate line of cases, the best known of which is *Leisy* v. *Hardin*, 135 U. S., 100, where it is held by the Supreme Court that an object of commerce is not subject to the taxing power of a State until after sale in the "original package." The doctrine which the Supreme Court has finally worked out in these cases, lately announced in *American Steel & Wire Co.* v. *Speed*, 192 U. S., 500, 519, 520, limits the scope of the decision as to the extent of the taxing power to "imports" (of foreign commerce), but the case has been frequently cited, in and out of the Supreme Court, as having the broader application.

Brown and others

v.

The State of Maryland.

[12 Wheaton, 419.]

1827.

The Attorney General, Mr. Wirt, and Mr. Jonathan Meredith for the plaintiffs in error.

Mr. Roger B. Taney and Mr. Reverdy Johnson for defendant in error.

March 12th. *Mr. Chief Justice* MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that Court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for

which they shall pay fifty dollars; and, in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offense; and that judgment is now before this Court.

The cause depends entirely on the question whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State before he shall be permitted to sell a bale or package so imported.

It has been truly said that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality. The plaintiffs * in error take the burthen upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States.

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1. To that which declares that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohi-

bition upon States "to lay any imposts, or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give it a much wider scope.

In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connexion with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy, and consequent practice, of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word,

we shall receive the same answer. They are the articles themselves which are brought into the country.

*438 "A duty on imports," then, is not merely * a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the

support of inspection laws goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by
*439 * the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports" proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our

commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, is may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its *existence, it might be urged against the existence of

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that which is universally acknowledged, and which is indispensable to the general safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason, be said that no State would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no State ought to exercise. Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the States. When we are inquiring whether a particular act is

within this prohibition, the question is not whether the State may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown that a tax on the article in the hands of the importer is within its words; and we think it too clear for controversy that the same tax is within its mischief. We think it unquestionable that such a tax has precisely the same tendency to enhance the price of the article as if imposed upon it while entering the port.

The counsel for the State of Maryland insist, with great reason, that, if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, * which all admit to be essential to the States, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

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It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that, in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular

clause. But while we admit that sound principles of construction ought to restrain all Courts from carrying the words of the prohibition beyond the object the constitution is intended to secure, that there must be a point of time when the prohibition ceases and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present, to say, generally, that, when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, *perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the

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importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

The counsel for the plaintiffs in error contend, that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea-stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavoured to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter

the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An *importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

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These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry-goods in the form in which it was imported, without a license. This state of things is changed, if he sells them or otherwise mixes them with the general property of the State, by breaking up his packages, and travelling with them as an itinerant peddler. In the first case the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it

shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the State. In the last cases the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he *stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms

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an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation, which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no farther than to prevent the States from doing that which it was the great object of the constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This

the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution.

*445 * In support of the argument, that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words "export" and "import." As, to export, it is said, means only to carry goods out of the country; so, to import means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the Legislature had a right to tax occupations? Or, sup-

pose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the constitution which declares that "no State shall lay any imposts, or duties on imports or exports."

2. Is it also repugnant to that clause in the constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to * their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating

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the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations and among the several States?

This question was considered in the case of *Gibbons* v. *Ogden* (9 Wheaton I.), in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, * when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

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If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the * inquiry concerning its existence.

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We think, then, that, if the power to authorize a sale exists in Congress, the conclusion, that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of

property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported, and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit, that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation. It results, necessarily, from this principle that the taxing power of the States must have some

limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of * justice in the Courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument farther, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in *M'Culloch* v. *The State of Maryland* (4 Wheat. Rep., 316), the decision in which case is, we think, entirely applicable to this.

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It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State. We do not mean to

give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the Court of Appeals of the State of Maryland in affirming the judgment of the Baltimore City Court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that Court, with instructions to enter judgment in favour of the appellants.

Ogden *v.* Saunders.

NOTE.

The three cases *Sturgis* v. *Crowninshield* (4 Wheaton, 122, and *supra*, i., 282), *M'Millan* v. *M'Neill* (4 Wheaton, 209, and *supra*, i., 301), and this case of *Ogden* v. *Saunders*, all dealt with and expounded the power of the States to pass insolvent and bankrupt laws. *Sturgis* v. *Crowninshield* arose on the question of the validity of a discharge in bankruptcy under a State statute passed subsequent to the date of the making of the contract. Marshall's opinion in that case declared at length the power of the States to enact insolvent and bankrupt laws as a power concurrent with the national power and yielding to it only when conflicting with it, and declared the statute in question invalid inasmuch as it was a bankruptcy statute which granted discharges and so annulled contracts, and so was a law impairing the obligation of the original contract. That opinion did not advert to the fact that the statute there in question was passed after the contract in question was entered into, but seemed to go the whole length of saying that any statute granting a discharge in bankruptcy, as such, impaired the obligation of contracts and was thus unconstitutional. In the course of that opinion counsel advanced the argument that if a State law granting a discharge in bankruptcy impaired the obligation of contracts, so also must every statute of limitations which forbade suit on a contract after a certain period, and so must every usury statute. Marshall's opinion distinguished these cases on the ground that they affected the remedies only, not the contract obligation itself,—a rather unsatisfactory distinction it would seem. A statute of limitations in terms limits the period within which an action must be

brought, but its effect is to destroy all rights in the contract as effectually as any discharge in bankruptcy might. Marshall further stated that a statute of limitations, or usury, acting retrospectively would be unconstitutional. That is the only hint in his opinion that a State bankruptcy statute was unconstitutional only so far as it acted retrospectively. The whole trend of the opinion is the other way.

The decision seems to have had no effect on the system of bankruptcy statutes then in operation. Calmly ignoring the decision the States continued to enact and enforce statutes granting discharges in bankruptcy.

In *M'Millan* v. *M'Neill* (4 Wheaton, 209, and *supra*, i., 301), which was argued at the same time as *Sturgis* v. *Crowninshield*, the bankrupt law in question was enacted prior to the contract, but there the point seems to have been quite overlooked and the discharge in bankruptcy declared unconstitutional and invalid on the general grounds laid down in *Sturgis* v. *Crowninshield*. *Farmers & Mechanics Bank of Pennsylvania* v. *Smith* (6 Wheaton, 131, and *supra*, i., 398) was another case substantially like *Sturgis* v. *Crowninshield*, and was decided on its authority. Up to that time there was no hint that the doctrines of *Sturgis* v. *Crowninshield* did not command the full adherence of the whole court.

Then in this case of *Ogden* v. *Saunders* the question squarely arose as to the validity of a discharge in bankruptcy under a State statute enacted before the claim on which suit was brought had come into existence. Then the majority of the court, refusing to follow Marshall, limited the doctrine of *Sturgis* v. *Crowinshield* to cases where the bankrupt law was passed subsequent to the creation of the contract, and declared the power of the States to pass bankrupt acts acting prospectively so far as they did not conflict with any statute on the subject passed by Congress.

From that opinion Marshall dissented—Story and Duvall with him—and it is his dissenting opinion that is here reprinted.

Whatever we may think as to the advisability of prohibiting the passage of State laws giving a discharge in bankruptcy,—it is the opinion of many learned commentators that Marshall's doctrine

should have been followed,—it is very hard to escape from the conclusion that a bankruptcy statute is quite like the statute of limitations. Marshall, in the dissenting opinion in this case of *Ogden* v. *Saunders*, bases his decision substantially on the ground that the obligation of a contract is an inherent obligation resulting in the nature of things from the fact of agreement between the parties. His view is that this natural, aboriginal right of contract is limited or modified by the laws of society, remedies for its enforcement in case of breach are provided and regulated by the laws of society or the system of government. A statute of usury, in his view, did not impair this natural obligation because its operation was to prohibit a certain form of agreement before it took effect. A statute of limitations did not impair this natural obligation because it acts on the remedies only which are created by society and law, not on the obligation as such, but a discharge in bankruptcy acts on the obligation itself. The reasoning smacks of the political theories of the framers of the Constitution, and is a curious example of Marshall's affection for the untramelled right of contract, but it is hard to see that it is anything more than ingenious and fantastic. It may well have been the part of wisdom to have provided that States should not have had the power to pass laws giving discharges in bankruptcy, but as a matter of construction the view finally adopted by the majority of the court in *Ogden* v. *Saunders* seems clearly sound and Marshall as clearly wrong,—the majority of legal commentators to the contrary notwithstanding. This is one of the notable cases where Marshall construed over-strongly the constitutional restrictions upon the powers of the States.

Ogden

v.

Saunders.

[12 Wheaton, 213.]

1827.

First argued by Mr. Clay, Mr. D. B. Ogden, and Mr. Haines, for plaintiff in error, and by Mr. Webster and Mr. Wheaton, for defendant in error. Again argued by the same gentlemen for defendant in error, and by the Attorney-General (Mr. Wirt), Mr. E. Livingston, Mr. D. B. Ogden, Mr. Jones, and Mr. Sampson, contra.

Mr. Chief Justice MARSHALL.[1] It is well known that the court has been divided in opinion on this case. Three judges, Mr. Justice Duvall, Mr. Justice Story, and myself, do not concur in the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent, as well as labor, at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration is, whether the act of the State of New York is consistent with or repugnant to the constitution of the United States?

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[1] This is a dissenting opinion.

This Court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character as to make it unnecessary now to say more than that if it be right that the power of preserving the constitution from legislative infraction should reside anywhere, it cannot be wrong, it must be right, that those on whom the delicate and important duty is conferred should perform it according to their best judgment.

Much, too, has been said concerning the principles of construction which ought to be applied to the constitution of the United States.

On this subject, also, the Court has taken such frequent occasion to declare its opinion as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers, is to repeat what has been already said more at large, and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the constitution on which the case now under consideration is supposed to depend, it may be proper to * inquire how far it is affected by the former decisions of this Court.

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In *Sturges* v. *Crowninshield* it was determined, that

an act which discharged the debtor from a contract entered into previous to its passage was repugnant to the Constitution. The reasoning which conducted the Court to that conclusion might, perhaps, conduct it farther; and with that reasoning (for myself alone this expression is used) I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for *Ogden* v. *Saunders*, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the Court in *Sturges* v. *Crowninshield*, that the positive authority of a decision is coextensive only with the facts on which it is made. In *Sturges v. Crowninshield* the law acted on a contract which was made before its passage; in this case the contract was entered into after the passage of the law.

In *M'Neil* v. *M'Millan* the contract, though subsequent to the passage of the act, was made in a different State, by persons residing in that State, and, consequently, without any view to the law the benefit of which was claimed by the debtor.

The Farmers' and Mechanics' Bank of Pennsylvania v. *Smith* differed from *Sturges* v. *Crowninshield* only in this: that the plaintiff and defendant were both residents of the State in which the law was enacted, and in which it was applied. The Court was of opinion that this difference was unimportant.

It has, then, been decided, that an act which discharges the debtor from pre-existing contracts is void; and that an act which operates on future contracts is inapplicable to a contract made in a

different State, at whatever time it may have been entered into.

Neither of these decisions comprehends the question now presented to the Court. It is, consequently, open for discussion.

The provision of the constitution is that "no State shall pass any law" "impairing the obligation of contracts." The plaintiff in error contends that this provision inhibits the passage of retrospective laws only,—of such as act on * contracts in existence at their passage. The defendant in error maintains that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from State legislation the obligation of which has become complete.

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That there is an essential difference in principle between laws which act on past and those which act on future contracts; that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion, must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class may very well consist with entire legislative freedom respecting those of the other. Yet, when we consider the nature of our Union; that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between States are, in many respects, obliterated; it would not be matter of surprise, if, on the delicate subject of contracts once formed, the interference of State legislation

should be greatly abridged, or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words; and, in making that construction, the whole clause, which consists of a single sentence, is to be taken together, and the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the State legislature is entirely prohibited. The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty without affecting the rights of individuals. These are, the powers "to enter into any treaty, alliance, or confederation; grant letters of marque or reprisal, coin money, emit bills of credit."

The second class of prohibited laws comprehends those whose operation consists in their action on individuals. * These are, laws which make anything but gold and silver coin a tender in payment of debts, bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts, or which grant any title of nobility.

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In all these cases, whether the thing prohibited be the exercise of mere political power, or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of

every description is comprehended within it. A State is as entirely forbidden to pass laws impairing the obligation of contracts, as to make treaties, or coin money. The question recurs, what is a law impairing the obligation of contracts?

In solving this question, all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence, and every word of it. Arguments have been drawn from the context, and from the particular terms in which the prohibition is expressed, for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively; and, on the other, of limiting it to laws which act on contracts previously formed.

The first impression which the words make on the mind would probably be, that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties; and, if it be not illegal, to bind them to the extent of their stipulation. It requires reflection, it requires some intellectual effort, to efface this impression, and to come to the conclusion, that the words contract and obligation, as used in the constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the States to punish offenders in criminal cases, the prohibition to pass bills of attainder and *ex post facto* laws, is, in its very terms, confined to pre-existing

cases. A bill of attainder can be only for crimes already committed; and a law is not *ex post facto* unless it looks back to an act done before its passage. Language is incapable of expressing in plainer terms, that the mind of the Convention was directed to * retroactive legislation. The thing forbidden is retroaction. But that part of the clause which relates to the civil transactions of individuals is expressed in more general terms; in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a State to make anything but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the time the law may be passed, and debts afterwards created. The prohibition has been considered as total; and yet the difference in principle between making property a tender in payment of debts contracted after the passage of the act and discharging those debts without payment or by the surrender of property, between an absolute right to tender in payment, and a contingent right to tender in payment or in discharge of the debt, is not clearly discernible. Nor is the difference in language so obvious as to denote plainly a difference of intention in the framers of the

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instrument. "No State shall make anything but gold and silver coin a tender in payment of debts." Does the word "debts" mean, generally, those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning which would confine the subsequent words to contracts existing at the passage of the law would go far in confining these words to debts existing at that time. Yet this distinction has never, we believe, occurred to any person. How soon it may occur is not for us to determine. We think it would, unquestionably, defeat the object of the clause.

The counsel for the plaintiff insist that the word "impairing," in the present tense, limits the signification of the provision to the operation of the act at the time of its passage; that no law can be accurately said to impair the obligation of contracts unless the contracts exist at the time. * The law cannot impair what does not exist. It cannot act on nonentities.

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There might be weight in this argument if the prohibited laws were such only as operated of themselves, and immediately on the contract. But insolvent laws are to operate on a future, contingent, unforeseen event. The time to which the word "impairing" applies is not the time of the passage of the act, but of its action on the contract; that is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York for the payment of money, and the debtor removes out of that State into

Connecticut, and becomes insolvent, it is not pretended that his debt can be discharged by the law of New York. Consequently, that law did not operate on the contract at its formation. When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation. Were its constitutionality, with respect to previous contracts, to be admitted, it would not impair their obligation until an insolvency should take place, and a certificate of discharge be granted. Till these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract, when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

A question of more difficulty has been pressed with great earnestness. It is: What is the original obligation of a contract made after the passage of such an act as the insolvent law of New York? Is it unconditional, to perform the very thing stipulated? or is the condition implied, that, in the event of insolvency, the contract shall be satisfied by the surrender of property? The original obligation, whatever that may be, must be preserved by the constitution. Any law which lessens must impair it.

All admit that the constitution refers to and preserves the legal, not the moral, obligation of a contract. * Obligations purely moral are to be enforced by the operation of internal and

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invisible agents, not by the agency of human laws. The restraints imposed on States by the constitution are intended for those objects which would, if not restrained, be the subject of State legislation. What, then, was the original legal obligation of the contract now under the consideration of the Court?

The plaintiff in error insists that the law enters into the contract so completely as to become a constituent part of it; that it is to be construed as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the act of the legislature.

This is, unquestionably, pressing the argument very far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously.

Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract; and a legislative act annulling the condition would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on pre-existing agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property enters into the contract, and forms a part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort

to give it that effect would impair their obligation. The counsel for the plaintiff perceive and avow this consequence, in effect, when they contend that to deny the operation of the law on the contract under consideration is to impair its obligation. Are gentlemen prepared to say that an insolvent law, once enacted, must, to a considerable extent, be permanent? that the Legislature is incapable of varying it so far as respects existing contracts?

So, too, if one of the conditions of an obligation for the payment of money be that, on the insolvency of the * obligor, or on any event agreed on by the parties, he should be at liberty to discharge it by the tender of all or part of his property, no question could exist respecting the validity of the contract, or respecting its security from legislative interference. If it should be determined that a law authorizing the same tender, on the same contingency, enters into and forms a part of the contract, then a tender law, though expressly forbidden, with an obvious view to its prospective as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts made after its passage to its control. If it be said that such a law would be obviously unconstitutional and void, and, therefore, could not be a constituent part of the contract, we answer that, if the insolvent law be unconstitutional, it is equally void, and equally incapable of becoming, by mere implication, a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect which is far

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from being so to another. The law now under consideration is, in the opinion of one party, clearly consistent with the constitution, and, in the opinion of the other, as clearly repugnant to it. We do not admit the correctness of that reasoning which would settle this question by introducing into the contract a stipulation not admitted by the parties.

This idea admits of being pressed still farther. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and be construed into an inanimate, inoperative, unmeaning clause.

Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a * general law, such as has been stated, and the incorporation of a particular law, such as the insolvent law of New York, into the contract. But will reason sustain this distinction? They say that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an

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article, reasonable in itself, and the full extent of which is understood.

But the principle contended for does not make the insertion of this new term or condition into the contract to depend upon its reasonableness. It is inserted because the legislature has so enacted. If the enactment of the legislature becomes a condition of the contract because it is an enactment, then it is a high prerogative, indeed, to decide that one enactment shall enter the contract, while another, proceeding from the same authority, shall be excluded from it.

The counsel for the plaintiff illustrates and supports this position by several legal principles, and by some decisions of this Court, which have been relied on as being applicable to it.

The first case put is interest on a bond payable on demand which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract.

Let the correctness of this averment be tried by the course of proceeding in such cases.

The failure to pay according to stipulation is a breach of the contract, and the means used to enforce it constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned is a single bill. In this case the party who has broken his contract is liable for damages. The proceeding to obtain those

damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed in the same declaration, and as being distinct from each other. The damages must be assessed by a jury; whereas, if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt; and yet, if a suitor were to declare on such a bond as containing this new term * for the payment of interest, he would not be permitted to give a bond in evidence in which this supposed term was not written. Any law regulating the proceedings of courts on this subject would be a law regulating the remedy.

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The liability of the drawer of a bill of exchange, stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the indorser. His contract is not written, but his name is evidence of his promise that the bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing, and, in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded

on the acts of the parties, and its extent is measured by those acts. A. draws on B. in favor of C., for value received. The bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawee, and has a right to expect that his promise will be performed. He has also a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that *his* bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, * impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either.

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The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of

the same character. Days of grace, from their very term, originate partly in convenience, and partly in the indulgence of the creditor. By the terms of the note the debtor has to the last hour of the day on which it becomes payable to comply with it, and it would often be inconvenient to take any steps after the close of the day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the act of the parties. The case cited from 9 Wheat. Rep., 581, is a note discounted in bank. In all such cases the bank receives, and the maker of the note pays, interest for the days of grace. This would be illegal and usurious if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the indorser of his failure does not arise until the failure has taken place, and, consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened.

The case of the *Bank of Columbia* v. *Oakley* (4 Wheat. Rep., 235) was one in which the Legislature had given a summary remedy to the bank for a broken contract, and had placed that remedy in the

hands of the bank itself. The case did not turn on the question whether the law of Maryland was introduced into the contract, but whether a party might not, by his own conduct, renounce his claim to the trial by jury in a particular case. The Court likened it to submissions to arbitration, and to stipulation and forthcoming bonds. The principle settled *343 * in that case is, that a party may renounce a benefit, and that Oakley had exercised this right.

The cases from Strange and East turn upon a principle which is generally recognized, but which is entirely distinct from that which they are cited to support. It is, that a man who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is, that laws act upon a contract, not that they enter into it, and become a stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the claim to it is extinguished. The external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power. The interference with those contracts, by introducing conditions into them not agreed to by the parties, would be a very unusual and a very extraordinary exercise of the legislative power, which ought not to be gratuitously attributed to laws that do not profess to claim it. If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other State as in New York, and

would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate.

It is not, we think, true that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casuality which is possible, but is never expected. In the ordinary course of human transactions, if even suspected, provision is made for it by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract.

We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states by arresting their power to repeal or modify such laws with respect to existing contracts.

*344 * But although the argument is not sustainable in this form, it assumes another, in which it is more plausible. Contract, it is said, being the creature of society, derives its obligation from the law; and although the law may not enter into the agreement so as to form a constituent part of it, still it acts externally upon the contract, and determines how far the principle of coercion shall be applied to it; and this being universally understood, no individual can complain justly of its application to himself,

in a case where it was known when the contract was formed.

This argument has been illustrated by references to the statutes of frauds, of usury, and of limitations. The construction of the words in the constitution respecting contracts, for which the defendants contend, would, it has been said, withdraw all these subjects from State legislation. The acknowledgment that they remain within it is urged as an admission that contract is not withdrawn by the constitution, but remains under State control, subject to this restriction only, that no law shall be passed impairing the obligation of contracts in existence at its passage.

The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation ; that it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a State to which he belongs, that he shall perform what he has undertaken to perform ; that, though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.

It is an argument of no inconsiderable weight against it that we find no trace of such an enactment. So far back as human research carries us, we find the judicial power, as a part of the executive, administering justice by the application of remedies to violated rights, or broken contracts. We find that power

applying these remedies on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim * to compensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them, of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and although they may be controlled are not given by human legislation.

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In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation? If one of them, having received and eaten

the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts, because upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle that the injured party may be the weakest. In society, the
*346 *wrong-doer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury; and to enforce that reparation if it be withheld. He may not

have the power to enforce it, but the whole civilized world concurs in saying that the power, if possessed, is rightfully used.

In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract, as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be, that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessa*rily

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surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy. The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained; but beyond these actual restraints the original power remains unimpaired.

This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law whose opinions have been viewed with profound respect by the wisest men of the present and of past ages.

Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire how far law acts externally on it, and may control that obligation. That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied. That it is capable of discharging the debtor, under the circumstances and on the conditions prescribed in the statute which has been pleaded in this case, will not be controverted. But as this is an operation which was not intended by the parties, nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract on the happening of a contingency, because it is the law. If it be not the law, it cannot have this effect. When its

existence as law is denied, that existence cannot be proved by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a State." In our system, the legislature of a State is the supreme power, in all cases where its action is not restrained by the constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say that, because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the legislature of New York; for the question * returns upon us, is this act a law? Is it consistent with, or repugnant to, the constitution of the United States? This question is to be solved only by the constitution itself.

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In examining it, we readily admit, that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the State legislatures, except in those special cases where restraint is imposed by the constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances on which the original validity of a contract shall be made to depend. If the legislative will be that certain agreements shall be in writing, that they shall be sealed, that they shall be

attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form, before they become obligatory, all these are regulations which society may rightfully make, and which do not come within the restrictions of the constitution, because they do not *impair* the obligation of the contract. The obligation must exist before it can be impaired; and a prohibition to impair it when made does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been enacted in the several States, and which are acknowledged to flow from the proper exercise of State sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the constitution.

The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation; and cannot impair that which never came into existence.

Acts of limitations approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may, therefore, be supposed to partake of the character of laws which impair its * obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles.

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In the case of *Sturges* v. *Crowninshield* it was

observed by the Court, that these statutes relate only to the remedies which are furnished in the Courts, and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision, that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated if contracts might be set up at any distance of time, when the evidence of payment might be lost, and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the Courts as a rule of justice. The legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts, or on written contracts not under seal, which are considered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its Courts, and the effect of that evidence, the State is exercising its acknowledged powers. It is likewise in the

exercise of its legitimate powers when it is regulating the remedy and mode of proceeding in its Courts.

The counsel for the plaintiff in error insist that the right to regulate the remedy and to modify the obligation of the contract are the same; that obligation and remedy are identical, that they are synonymous,—two words conveying the same idea.

The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is co-
*350 eval with the *undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a pre-existing obligation.

If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private, individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract

is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but where not regulated it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times, and are derived from different sources.

But, although the identity of obligation and remedy be disproved, it may be, and has been, urged that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation; that they live, languish and die together. The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation, while it leaves the remedy to the State governments.

We do not perceive this absurdity or self-contradiction.

Our country exhibits the extraordinary spectacle of distinct and, in many respects, independent governments over the same territory and the same people. The local governments are restrained from impairing the obligation of * contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the obligation is distinct from the remedy; and it would seem to follow that law

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might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its performance. That instrument treats the States with the respect which is due to intelligent beings, understanding their duties and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the States from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a State be sufficiently insane to shut up or abolish its Courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would not. If the debtor should come within the jurisdiction of any Court of another State, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation; for passing the line of a State cannot recreate an obligation which was extinguished. It must be the original obligation derived from the agreement of the parties, and which exists unimpaired though the remedy was withdrawn.

But we are told that the power of the State over the remedy may be used to the destruction of all beneficial results from the right; and hence it is inferred that the construction which maintains the

inviolability of the obligation must be extended to the power of regulating the remedy.

The difficulty which this view of the subject presents does not proceed from the identity or connection of right and remedy, but from the existence of distinct governments acting on kindred subjects. The constitution contemplates restraint as to the obligation of contracts, not as to the application of remedy. If this restraint affects a power which the constitution did not mean to touch, it can *only be when
*352 that power is used as an instrument of hostility to invade the inviolability of contract, which is placed beyond its reach. A State may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the constitution. Thus, the power over its domestic police, the power to regulate commerce purely internal, may be so exercised as to interfere with regulations of commerce with foreign nations or between the States. In such cases, the power which is supreme must control that which is not supreme, when they come in conflict. But this principle does not involve any self-contradiction, or deny the existence of the several powers in the respective governments. So, if a State shall not merely modify or withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

The counsel for the plaintiff in error put a case of

more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this. The law affords remedy by giving execution against the person or the property, or both. The same power which can withdraw the remedy against the person can withdraw that against the property, or that against both, and thus effectually defeat the obligation. The constitution, we are told, deals not with form, but with substance; and cannot be presumed, if it designed to protect the obligation of contracts from State legislation, to have left it thus obviously exposed to destruction.

The answer is, that if the law goes farther, and annuls the obligation without affording the remedy which satisfies it, if its action on the remedy be such as palpably to impair the obligation of the contract, the very case arises which we suppose to be within the constitution. If it leaves the obligation untouched, but withholds the remedy, or affords one which is merely nominal, it is like all other cases of misgovernment, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy. If that high sense of duty

*353 * which men selected for the government of their fellow-citizens must be supposed to feel, furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath, taken by every member, to support the constitution of the United States, furnishes no security against intentional attempts to violate its spirit while evading its letter, the question, how far the constitution

interposes a shield for the protection of an injured individual who demands from a Court of justice that remedy which every government ought to afford, will depend on the law itself which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be, at least, premature. But, however the question might be decided, should it be even determined that such a law would be a successful evasion of the constitution, it does not follow that an act, which operates directly on the contract after it is made, is not within the restriction imposed on the States by that instrument. The validity of a law acting directly on the obligation is not proved by showing that the constitution has provided no means for compelling the States to enforce it.

We perceive, then, no reason for the opinion that the prohibition "to pass any law impairing the obligation of contracts" is incompatible with the fair exercise of that discretion, which the State legislatures possess, in common with all governments, to regulate the remedies afforded by their own Courts. We think, that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering countenance, we think, this idea. No State shall "pass any law impairing the obligation of contracts." These words seem to us to import, that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it.

When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of
*354 * nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original, intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our constitution took the same view of the subject, and the language they have used confirms this opinion.

The propositions we have endeavoured to maintain, of the truth of which we are ourselves convinced, are these :

That the words of the clause in the constitution which we are considering, taken in their natural obvious sense, admit of a prospective, as well as of a retrospective, operation ;

That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties ; nor does it act externally on the agreement, unless it have the full force of law ;

That contracts derive their obligation from the act of the parties, not from the grant of government ; and the right of government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the State, is entirely consistent with their inviolability after they have been formed ;

That the obligation of a contract is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it does not imply a prohibition to vary the remedy; nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in Convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, * and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the vir-

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tuous, of this great community, and was one of the important benefits expected from a reform of the government.

To impose restraints on State legislation as respected this delicate and interesting subject, was thought necessary by all those patriots who could take an enlightened and comprehensive view of our situation; and the principle obtained an early admission into the various schemes of government which were submitted to the Convention. In framing an instrument which was intended to be perpetual, the presumption is strong that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time is intended so to operate. But, if the construction for which the plaintiff's counsel contend be the true one, the constitution will have imposed a restriction, in language indicating perpetuity, which every State in the Union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless. Instead of introducing a great principle, prohibiting all laws of this obnoxious character, the constitution will only suspend their operation for a moment, or except from it pre-existing cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument.

This construction would change the character of the provision, and convert an inhibition to pass laws impairing the obligation of contracts into an inhibition to pass retrospec*tive laws. Had this been the intention of the Convention, is it not reasonable to believe that it would have been so expressed? Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found, and would have been used, to convey this idea. The very word would have occurred to the framers of the instrument, and we should have, probably, found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or, if the intention had been not to embrace all retrospective laws, but those only which related to contracts, still the word would have been introduced, and the State legislatures would have been forbidden "to pass any *retrospective* law impairing the obligation of contracts," or "to pass any law impairing the obligation of any contracts previously made." Words which directly and plainly express the cardinal intent always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly, there is an imperfection in human language, which often exposes the same sentence to different constructions. But it is rare, indeed, for a person of clear and distinct perceptions, intending to convey one principal idea, so to express himself as to leave

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any doubt respecting that idea. It may be uncertain whether his words comprehend other things not immediately in his mind; but it can seldom be uncertain whether he intends the particular thing to which his mind is specially directed. If the mind of the Convention, in framing this prohibition, had been directed, not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospective operation, it is scarcely conceivable that some word would not have been used indicating this idea. In instruments prepared on great consideration, general terms, comprehending a whole subject, are seldom employed to designate a particular, we might say a minute, portion of that subject. The general language of the clause is such as might be suggested by a general intent to prohibit State legislation on the subject to which that language is applied—the obligation of * contracts; not such as would be suggested by a particular intent to prohibit retrospective legislation.

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It is also worthy of consideration that those laws which had effected all that mischief the constitution intended to prevent were prospective, as well as retrospective, in their operation. They embraced future contracts as well as those previously formed. There is the less reason for imputing to the Convention an intention, not manifested by their language, to confine a restriction, intended to guard against the recurrence of those mischiefs, to retrospective legislation. For these reasons, we are of opinion that, on this point, the District Court of Louisiana has decided rightly.

American Insurance Company

v.

Canter.

NOTE.

THIS case, with *Loughborough* v. *Blake*, 5 Wheat., 317, and *supra*, are of peculiar interest because they are the only expression of Marshall's views as to the constitutional power of the United States to govern territory not included in any State.

Loughborough v. *Blake* upheld the constitutionality of a direct tax in the District of Columbia. The main question raised in that case was as to whether Congress could lay a tax on the District for national purposes, and the Court held in the affirmative, basing that view on an interpretation of the words "United States" in the eighth section of the first article of the Constitution (giving the right to lay direct taxes), as covering both States and Territories. That interpretation was not necessary to the decision of the case, and certainly had no reference to the entirely different questions recently raised in the Supreme Court in the so-called Insular Cases (*De Lima* v. *Bidwell*, 182 U. S., 1). But this American Insurance case raised questions very close to the questions there considered as to the constitutional powers of the United States in the government of its dependencies of Porto Rico and the Philippines.

This case decided, in effect, that Congress, under its right to make laws for the Territories, had the right to confer admiralty jurisdiction on territorial courts, and that the provision of the Constitution giving to the federal courts jurisdiction of ad-

miralty cases only applied within the States. Marshall assumed, without argument, that the provisions of the Constitution as to the jurisdiction of federal courts did not extend to territory acquired by the United States. A contrary decision would clearly have produced an unfortunate, and in some instances an almost unworkable condition of affairs, and would have made it more difficult for the Supreme Court to reach the fortunate position which it finally took in the Insular Cases. It cannot be fairly said, however, that Marshall's opinion is in anyway the basis of the Insular Cases, or that it had any particular weight in those cases.

The American Insurance Company,

and

The Ocean Insurance Company,

(of New York,)

v.

356 Bales of Cotton,

David Canter, Claimant.

[1 Peters, 511.]

1828.

Mr. Ogden for the appellants.
Mr. Whipple and Mr. Webster for the claimants.

Mr. Chief Justice Marshall delivered the opinion of the Court: —

The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of three hundred and fifty-six bales of cotton, part of the cargo of the ship Point à Petre, which had been insured by them on a voyage from New Orleans to Havre de Grâce, in France. The Point à Petre was wrecked on the coast of Florida, the cargo

saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors, by virtue of a decree of a Court, consisting of a notary and five jurors, which was erected by an Act of the territorial legislature of Florida. The owners abandoned to the underwriters, who, having accepted the same, proceeded against the property; alleging that the sale was not made by order of a court competent to change the property.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent Court, which awarded seventy-six per cent. to the salvors on the value of the property saved.

The district judge pronounced the decree of the territorial Court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence; deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs, on the ground that the proceedings of the Court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this court.

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. The conformity of that sale to the order under which it was made has not been controverted. Its validity has been denied on the

ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an Act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That Act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require, that, *in deciding this question, the *542 Court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same

act which transfers their country transfers the allegiance of those who remain in it; and the law which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision—"The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a state. In the meantime Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the United States which has not by

becoming a state acquired the means of self-government may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United * States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it Congress, in 1822, passed "an Act for the establishment of a territorial government in Florida"; and on the 3d of March, 1823, passed another Act to amend the Act of 1822. Under this Act, the territorial legislature enacted the law now under consideration.

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The 5th section of the Act of 1823 creates a territorial legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid which is inconsistent with the laws and Constitution of the United States.

The 7th section enacts: "That the judicial power shall be vested in two Superior Courts, and in such inferior Courts and justices of the peace, as the legislative council of the territory may from time to time establish." After prescribing the place of session and the jurisdictional limits of each Court, the Act proceeds to say: "Within its limits, herein described, each Court shall have jurisdiction in all criminal cases, and exclusive jurisdiction in all capital offenses, and original jurisdiction in all civil cases of the value of one hundred dollars, arising under, and cognizable by, the laws of the territory, now in force therein, or

which may at any time be enacted by the legislative council thereof."

The 8th section enacts: "That each of the said Superior Courts shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which, by an Act to establish the judicial courts of the United States, approved the 24th of September, 1789, and an Act in addition to the Act entitled an Act to establish the judicial Courts of the United States, approved the 2d of March, 1793, was vested in the Court of the Kentucky district."

The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction that their laws shall not be "inconsistent with the laws and Constitution of the United States." As salvage is admitted to come within this description, the act is valid, unless it can be brought within the restriction.

The counsel for the libelants contend that it is inconsistent with both the law and the Constitution; that it is inconsistent with the provisions of the law by which the territorial government was created, and with the amendatory Act of March, 1823. It vests, they say, in an inferior tribunal a jurisdiction which is by those acts vested exclusively in the Superior Courts of the territory.

*544 * This argument requires an attentive consideration of the sections which define the jurisdiction of the Superior Courts.

The 7th section of the Act of 1823 vests the whole

judicial power of the territory "in two Superior Courts, and in such inferior Courts, and justices of the peace, as the legislative council of the territory may from time to time establish." This general grant is common to the superior and inferior Courts, and their jurisdiction is concurrent, except so far as it may be made exclusive, in either, by other provisions of the statute. The jurisdiction of the Superior Courts is declared to be exclusive over capital offences; on every other question on which those Courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior Courts. Among these subjects are "all civil cases arising under and cognizable by the laws of the territory, now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle by using the words "laws of the Territory now in force therein." No laws could then have been in force but those enacted by the Spanish government. If among these a law existed on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over cases arising under it was conferred on the Superior Courts, but that jurisdiction was not exclusive. A territorial Act, conferring jurisdiction over

the same cases on an inferior Court, would not have been inconsistent with this section.

The 8th section extends the jurisdiction of the Superior Courts, in terms which admit of more doubt. The words are, "That each of the said Superior Courts shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which, by an Act to establish the judicial Courts of the United States, was vested in the Court of the Kentucky district."

The 11th section of the Act declares, "That the laws of the United States relating to the revenue and its collection, and all other public Acts of the United States not inconsistent or repugnant to this Act, shall extend to, and have full force and effect in, the territory aforesaid."

The laws which are extended to the territory, by this section, were either for the punishment of crime or for civil *purposes. Jurisdiction is given in all criminal cases by the seventh section; but in civil cases, that section gives jurisdiction only in those which arise under and are cognizable by the laws of the territory; consequently, all civil cases, arising under the laws which are extended to the territory by the 11th section, are cognizable in the territorial Courts by virtue of the eighth section; and in those cases the superior Courts may exercise the same jurisdiction as is exercised by the Court for the Kentucky district.

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The question suggested by this view of the subject,

on which the case under consideration must depend, is this:

Is the admiralty jurisdiction of the District Courts of the United States vested in the Superior Courts of Florida under the words of the eighth section declaring that each of the said courts "shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States," which was vested in the Courts of the Kentucky district?

It is observable that this clause does not confer on the territorial Courts all the jurisdiction which is vested in the Court of the Kentucky district, but that part of it only which applies to "cases arising under the laws and Constitution of the United States." Is a case of admiralty of this description?

The Constitution and laws of the United States give jurisdiction to the District Courts over all cases in admiralty; but jurisdiction over the case does not constitute the case itself. We are, therefore, to inquire whether cases in admiralty, and cases arising under the laws and Constitution of the United States, are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all

cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction."

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases * are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise. It is not, then, to the eighth section of the territorial law that we are to look for the grant of admiralty and maritime jurisdiction to the territorial Courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the District Court of Kentucky.

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It has been contended that, by the Constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one Supreme Court, and in such inferior Courts as Congress shall from time to time ordain and establish." Hence it has been argued that Congress cannot vest admiralty jurisdiction in Courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the Judges both of the Supreme and inferior Courts shall hold their offices during good behavior." The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not Constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution; but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised, in the States, in those Courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and of a state government.

We think, then, that the Act of the territorial legislature, erecting the Court by whose decree the cargo of the Point à Petre was sold, is not "inconsistent with the laws and Constitution of the United

States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed with costs.

Willson

v.

The Blackbird Creek Marsh Company.

NOTE.

THE declaration filed by the plaintiffs in this case set out that The Blackbird Creek Marsh Company owned land on both sides of the Blackbird Creek which flowed into the Delaware River, and under legislative authority had constructed a dam across it, and that the defendants, the owners of the sloop *Sally*, licensed under the United States navigation laws, had broken and injured the dam. To this declaration the defendants pleaded that the Blackbird Creek was a navigable creek in tidewater, and that the plaintiffs' dam was an unlawful obstruction of this navigable creek. To that plea the plaintiffs demurred, and the demurrer was sustained in the State courts of Delaware, whence it came by writ of error to the Supreme Court, where the demurrer was again sustained.

Marshall's decision is very brief—to the effect that the Delaware statute authorizing the dam was constitutional and did not conflict with the provision of the Federal Constitution giving Congress the power to regulate commerce. In a short statement at the end of the opinion he pointed out that Congress had not

made any regulation of commerce with which the Delaware statute conflicted and that the statute was not repugnant to the national power over commerce in its "dormant" state. The case is decided on the briefest and most unsatisfactory reasoning. It has been constantly quoted as sustaining the view that the State power over commerce was a concurrent power abiding in the States and valid until it came in conflict with some statute of Congress,—though Marshall had declared with vigor in *Gibbons* v. *Ogden* (9 Wheat., p. 194, and *supra*), and in *Brown* v. *Maryland* (12 Wheat., 419, and *supra*), that the national power over commerce was exclusive and that no such power existed in the States. The case has met with many varying interpretations and was cited as supporting the doctrine of concurrent powers in *Cooley* v. *Board of Port Wardens*, 12 How., 299, 319, and in many other cases. It seems, however, that Marshall and his court had no idea that this case established any new rule as to the commerce clause;—"it is improbable that the court could have intended to disapprove the argument in both of the earlier cases upon this subject in so brief a manner and without express reference to them."[1]

The doctrine which this case set out, however, has been supported on a different ground, *i. e.*, of the police power remaining in the States, by the later cases (see *Leovy* v. *United States*, 177 U. S., 621, 629 for citations of authorities; see also *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, and many other cases).

[1] Prentice and Eagan's *Commerce Clause of the Federal Constitution* (Chicago, 1898), p. 20. See also the opinion of Mr. Justice Clifford in *Gilman* v. *Philadelphia* (3 Wall., 713, 743), there referred to.

Thompson Willson and others

v.

The Blackbird Creek Marsh Company.

[2 Peters, 245.]

1829.

Mr. Coxe for plaintiffs in error.
Mr. Wirt, Attorney General, contra.

Mr. Chief Justice MARSHALL delivered the opinion of the Court:

The defendants in error deny the jurisdiction of this Court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into the question.

Undoubtedly the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question which could have been dis-

cussed in the state court. That question must have been discussed and decided.

The plaintiffs sustain their right to build a dam across the creek by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.

The plea does not controvert the existence of the act, but denies its capacity to authorize the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way in the nature of a highway. This plea draws nothing into question but the validity of the act; and the judgment of the Court must have been in favor of its validity. Its consistency with, or repugnancy to the constitution of the United States, necessarily arises upon these pleadings, and must have been determined. This Court has repeatedly decided in favor of its jurisdiction in such a case. *Martin* vs. *Hunter's Lessee*[1]; **Miller* vs. *Nicholls*,[2] and *Williams* vs. *Norris*[3] are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record that the constitution or law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the judicial act, if the record shows, that the constitution or a law or a treaty of the United States

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[1] 1 Wheaton, 355. [2] 4 Wheaton, 311. [3] 12 Wheaton, 117.

must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law.

The jurisdiction of the Court being established, the more doubtful question is to be considered, whether the act incorporating the Black Bird Creek Marsh Company is repugnant to the constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows.

The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes * in conflict with the power of the United States "to regulate commerce with foreign nations and among the several states."

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If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question.

We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

There is no error, and the judgment is affirmed.

Foster and Elam.

NOTE.

THIS case is mainly of interest, first in showing Marshall's views on the Louisiana Cession in 1803, the constitutionality of which had exercised the Jeffersonians; and second and more important in showing Marshall's very clearly stated and most prudent position that the judiciary could not differ from the political departments of the government in the diplomatic facts of relations with foreign governments and nations. The restraint of this decision that the executive and treaty-making power are the sole judges of such questions is in curious contrast with the willingness of the court to go behind the powers of the executive on constitutional questions. On this aspect there can be no doubt of the soundness and wisdom of the law and it has been frequently cited as authority for the refusal of the Supreme Court to enter into political controversies,—even so soon as *Luther* v. *Borden*, 7 How., 56, and in many later cases. On the more technical questions as to the self-executing nature of treaty provisions the case has been regarded as unsound (*United States* v. *Arredondo*, 6 Pet., 756).

James Foster and Peasants Elam

v.

David Neilson.

[2 Peters, 253.]

1829.

The case was argued by Mr. Coxe and Mr. Webster for the plaintiffs in error, and by Mr. Jones for the defendant.

Mr. Chief Justice MARSHALL delivered the opinion of the Court:

This suit was brought by the plaintiffs in error in the court of the United States for the eastern district of Louisiana, to recover a tract of land lying in that district, about thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant for 40,000 arpents of land, made by the Spanish Governor, on the 2d of January, 1804, to Jayme Joydra, and ratified by the king of Spain on the 29th of May, 1804. The petition and order of survey are dated in September, 1803, and the return of the survey itself was made on the 27th of October in the same year. The defendant excepted to the petition of the plaintiffs, alleging that it does not show a title on which * they can recover; that the territory within which the land claimed is situated, had been ceded, before

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the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. The court sustained the exception, and dismissed the petition. The cause is brought before this Court by a writ of error.

The case presents this very intricate, and at one time very interesting question: To whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?

This question has been repeatedly discussed with great talent and research, by the government of the United States and that of Spain. The United States have perseveringly and earnestly insisted, that by the treaty of St. Ildefonso, made on the 1st of October in the year 1800, Spain ceded the disputed territory as part of Louisiana to France; and that France, by the treaty of Paris, signed on the 30th of April, 1803, and ratified on the 21st of October in the same year, ceded it to the United States. Spain has with equal perseverance and earnestness maintained, that her cession to France comprehended that territory only which was at that time denominated Louisiana, consisting of the island of New Orleans, and the country she received from France west of the Mississippi.

Without tracing the title of France to its origin, we may state with confidence that at the commencement of the war of 1756, she was the undisputed possessor of the Province of Louisiana, lying on both sides the Mississippi, and extending eastward beyond

the bay of Mobile. Spain was at the same time in possession of Florida; and it is understood that the river Perdido separated the two provinces from each other.

Such was the state of possession and title at the treaty of Paris, concluded between Great Britain, France, and Spain, on the 10th day of February, 1763. By that treaty France ceded to Great Britain the river and port of the Mobile, and all her possessions on the left side of the river Mississippi, except the town of New Orleans and the island on which it
*301 * is situated; and by the same treaty Spain ceded Florida to Great Britain. The residue of Louisiana was ceded by France to Spain, in a separate and secret treaty between those two powers. The king of Great Britain being thus the acknowledged sovereign of the whole country east of the Mississippi, except the island of New Orleans, divided his late acquisition in the south into two provinces, East and West Florida. The latter comprehended so much of the country ceded by France as lay south of the 31st degree of north latitude, and a part of that ceded by Spain.

By the treaty of peace between Great Britain and Spain, signed at Versailles on the 3d of September, 1783, Great Britain ceded East and West Florida to Spain; and those provinces continued to be known and governed by those names, as long as they remained in the possession and under the dominion of his catholic majesty.

On the 1st of October, in the year 1800, a secret

treaty was concluded between France and Spain at St. Ildefonso, the third article of which is in these words: "His catholic majesty promises and engages on his part to retrocede to the French republic, six months after the full and entire execution of the conditions and stipulations relative to his royal highness the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and the other states."

The treaty of the 30th of April, 1803, by which the United States acquired Louisiana, after reciting this article, proceeds to state, that "the first consul of the French republic doth hereby cede to the United States, in the name of the French republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French republic, in virtue of the above-mentioned treaty concluded with his catholic majesty." The 4th article stipulates that "there shall be sent by the government of France a commissary to Louisiana, to the end that he do every act necessary, as well to re-

*302 ceive from the officers of his catholic * majesty the said country, and its dependencies, in the name of the French republic, if it has not been already done, as to transmit it in the name of the French republic to the commissary or agent of the United States."

On the 30th of November, 1803, Peter Clement Laussatt, colonial prefect and commissioner of the French republic, authorized, by full powers, dated the 6th of June, 1803, to receive the surrender of the province of Louisiana, presented those powers to Don Manuel Salcedo, governor of Louisiana and West Florida, and to the marquis de Casa Calvo, commissioners on the part of Spain, together with full powers to them from his catholic majesty to make the surrender. These full powers were dated at Barcelona the 15th of October, 1802. The act of surrender declares that in virtue of these full powers, the Spanish commissioners, Don Manuel Salcedo and the marquis de Casa Calvo, "put from this moment the said French commissioner, the citizen Laussatt, in possession of the colony of Louisiana and of its dependencies, as also of the town and island of New Orleans, in the same extent which they now have, and which they had in the hands of France when she ceded them to the royal crown of Spain, and such as they should be after the treaties subsequently entered into between the states of his catholic majesty and those of other powers."

The following is an extract from the order of the king of Spain referred to by the commissioners in the act of delivery. "Don Carlos, by the grace of God, &c." "Deeming it convenient to retrocede to the French republic the colony and province of Louisiana, I order you, as soon as the present order shall be presented to you by general Victor, or other officer duly authorized by the French republic, to

take charge of said delivery; you will put him in possession of the colony of Louisiana and its dependencies, as also of the city and island of New Orleans, with the same extent that it now has, that it had in the hands of France when she ceded it to my royal crown, and such as it ought to be after the treaties which have successively taken place between my states and those of other powers."

Previous to the arrival of the French commissioner, the *governor of the provinces of Louisiana and West Florida, and the marquis de Casa Calvo, had issued their proclamation, dated the 18th of May, 1803; in which they say, "his majesty having before his eyes the obligations imposed by the treaties, and desirous of avoiding any disputes that might arise, has deigned to resolve that the delivery of the colony and island of New Orleans, which is to be made to the general of division Victor, or such other officer as may be legally authorized by the government of the French republic, shall be executed on the same terms that France ceded it to his majesty; in virtue of which, the limits of both shores of the river St. Louis or Mississippi, shall remain as they were irrevocably fixed by the 7th article of the definitive treaty of peace, concluded at Paris the 10th of February, 1763, according to which the settlements from the river Manshac or Iberville, to the line which separates the American territory from the dominions of the king, remain in possession of Spain and annexed to West Florida."

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On the 21st of October, 1803, congress passed an

act to enable the president to take possession of the territory ceded by France to the United States; in pursuance of which commissioners were appointed, to whom Monsieur Laussatt, the commissioner of the French republic, surrendered New Orleans and the province of Louisiana on the 20th of December, 1803. The surrender was made in general terms; but no actual possession was taken of the territory lying east of New Orleans. The government of the United States, however, soon manifested the opinion that the whole country originally held by France, and belonging to Spain when the treaty of St. Ildefonso was concluded, was by that treaty retroceded to France.

On the 24th of February, 1804, congress passed an act for laying and collecting duties within the ceded territories, which authorized the president, whenever he should deem it expedient, to erect the shores, &c., of the bay and river Mobile, and of the other rivers, creeks, &c., emptying into the gulph of Mexico east of the said river Mobile, and west thereof to the Pascagoula, inclusive, into a separate district, and to establish a port of entry and delivery therein. The *port established in pursuance of this act was at fort Stoddert, within the acknowledged jurisdiction of the United States; and this circumstance appears to have been offered as a sufficient answer to the subsequent remonstrances of Spain against the measure. It must be considered, not as acting on the territory, but as indicating the American exposition of the treaty, and exhibiting the claim its government intended to assert.

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In the same session on the 26th of March, 1804, congress passed an act erecting Louisiana into two territories. This act declares that the country ceded by France to the United States south of the Mississippi territory, and south of an east and west line, to commence on the Mississippi river at the 33d degree of north latitude and run west to the western boundary of the cession, shall constitute a territory under the name of the territory of Orleans. Now, the Mississippi territory extended to the 31st degree of north latitude, and the country south of that territory was necessarily the country which Spain held as West Florida; but still its constituting a part of the territory of Orleans depends on the fact that it was a part of the country ceded by France to the United States. No practical application of the laws of the United States to this part of the territory was attempted, nor could be made, while the country remained in the actual possession of a foreign power.

The 14th section enacts "that all grants for lands within the territories ceded by the French republic to the United States by the treaty of the 30th of April, 1803, the title whereof was at the date of the treaty of St. Ildefonso in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto of whatsoever nature towards the obtaining any grant, title or claim to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity." A proviso excepts the titles of

actual settlers acquired before the 20th of December, 1803, from the operation of this section. It was obviously intended to act on all grants made by Spain after her retrocession of Louisiana to France, and *305 * without deciding on the extent of that retrocession, to put the titles which might be thus acquired through the whole territory, whatever might be its extent, completely under the control of the American government.

The president was authorized to appoint registers or recorders of lands acquired under the Spanish and French governments, and boards of commissioners who should receive all claims to lands, and hear and determine in a summary way all matters respecting such claims. Their proceedings were to be reported to the secretary of the treasury, to be laid before congress for the final decision of that body.

Previous to the acquisition of Louisiana, the ministers of the United States had been instructed to endeavor to obtain the Floridas from Spain. After that acquisition, this object was still pursued, and the friendly aid of the French government towards its attainment was requested. On the suggestion of Mr. Talleyrand that the time was unfavourable, the design was suspended. The government of the United States, however, soon resumed its purpose; and the settlement of the boundaries of Louisiana was blended with the purchase of the Floridas, and the adjustment of heavy claims made by the United States for American property, condemned in the

ports of Spain during the war which was terminated by the treaty of Amiens.

On his way to Madrid, Mr. Monroe, who was empowered in conjunction with Mr. Pinckney, the American minister at the court of his catholic majesty, to conduct the negotiation, passed through Paris; and addressed a letter to the minister of exterior relations, in which he detailed the objects of his mission, and his views respecting the boundaries of Louisiana. In his answer to this letter, dated the 21st of December, 1804, Mr. Talleyrand declared, in decided terms, that by the treaty of St. Ildefonso, Spain retroceded to France no part of the territory east of the Iberville which had been held and known as West Florida; and that in all the negotiations between the two governments, Spain had constantly refused to cede any part of the Floridas, even from the Mississippi to the Mobile. He added that he was authorized by his imperial majesty to say, that at the beginning
*306 * of the year 1802, general Bournonville had been charged to open a new negotiation with Spain for the acquisition of the Floridas; but this project had not been followed by a treaty.

Had France and Spain agreed upon the boundaries of the retroceded territory before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits. But the declarations of France made after parting with the province cannot be admitted as conclusive. In questions of this character, political considerations have too much influence over the conduct of nations to

permit their declarations to decide the course of an independent government in a matter vitally interesting to itself.

Soon after the arrival of Mr. Monroe at his place of destination, the negotiations commenced at Aranjuez. Every word in that article of the treaty of St. Ildefonso which ceded Louisiana to France, was scanned by the ministers on both sides with all the critical acumen which talents and zeal could bring into their service. Every argument drawn from collateral circumstances, connected with the subject, which could be supposed to elucidate it, was exhausted. No advance towards an arrangement was made, and the negotiation terminated, leaving each party firm in his original opinion and purpose. Each persevered in maintaining the construction with which he had commenced. The discussion has since been resumed between the two nations with as much ability and with as little success. The question has been again argued at this bar, with the same talent and research which it has uniformly called forth. Every topic which relates to it has been completely exhausted; and the Court by reasoning on the subject could only repeat what is familiar to all.

We shall say only, that the language of the article may admit of either construction, and it is scarcely possible to consider the arguments on either side without believing that they proceed from a conviction of their truth. The phrase on which the controversy mainly depends, that Spain retrocedes Louisiana with

the same extent that it had when France possessed it, might so readily have been expressed * in plain language, that it is difficult to resist the persuasion that the ambiguity was intentional. Had Louisiana been retroceded with the same extent that it had when France ceded it to Spain, or with the same extent that it had before the cession of any part of it to England, no controversy respecting its limits could have arisen. Had the parties concurred in their intention, a plain mode of expressing that intention would have presented itself to them. But Spain has always manifested infinite repugnance to the surrender of territory, and was probably unwilling to give back more than she had received. The introduction of ambiguous phrases into the treaty, which power might afterwards construe according to circumstances, was a measure which the strong and the politic might not be disinclined to employ.

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However this may be, it is, we think, incontestable, that the American construction of the article, if not entirely free from question, is supported by arguments of great strength which cannot be easily confuted.

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion

of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

The convulsed state of European Spain affected her influence over her colonies; and a degree of disorder prevailed *in the Floridas, at which the United States could not look with indifference. In October, 1810, the president issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far east as the Perdido, and to hold it for the United States. This measure was avowedly intended as an assertion of the title of the United States; but as an assertion which was rendered necessary in order to avoid evils which might contravene the wishes of both parties, and which would still leave the territory "a subject of fair and friendly negotiation and adjustment."

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In April 1812, congress passed "an act to enlarge the limits of the state of Louisiana." This act describes lines which comprehend the land in controversy, and declares that the country included within them shall become and form a part of the state of Louisiana.

In May of the same year, another act was passed,

annexing the residue of the country west of the Perdido to the Mississippi territory.

And in February 1813, the president was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not now in possession of the United States."

On the third of March 1817, congress erected that part of Florida which had been annexed to the Mississippi territory, into a separate territory, called Alabama.

The powers of government were extended to, and exercised in those parts of West Florida which composed a part of Louisiana and Mississippi, respectively; and a separate government was erected in Alabama. (U. S. L., c. 4, 409.)

In March 1819, "congress passed an act to enable the people of Alabama to form a constitution and state government." And in December, 1819, she was admitted into the Union, and declared one of the United States of America. The treaty of amity, settlement and limits, between the United States and Spain, was signed at Washington on the 22d day of February, 1819, but was not ratified by Spain till the 24th day of October, 1820; nor by the United States until the 22d day of February, 1821. So that Alabama was *admitted into the union as an independent state, in virtue of the title acquired by the United States to her territory under the treaty of April 1803.

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After these acts of sovereign power over the territory in dispute, asserting the American construction

of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. Had this suit been instituted immediately after the passage of the act for extending the bounds of Louisiana, could the Spanish construction of the treaty of St. Ildefonso have been maintained? Could the plaintiffs have insisted that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful; and that his title under a Spanish grant must prevail, because the acts of congress on the subject were founded on a misconstruction of the treaty? If it be said that this statement does not present the question fairly, because a plaintiff admits the authority of the court, let the parties be changed. If the Spanish grantee had obtained possession so as to be the defendant, would a court of the United States maintain his title under a Spanish grant, made

subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would, we think, have subverted those principles which govern the relations between the legislative and judicial departments, and mark the limits of each.

*310 * If the rights of the parties are in any degree changed, that change must be produced by the subsequent arrangements made between the two governments.

A "treaty of amity, settlement, and limits, between the United States of America and the king of Spain," was signed at Washington on the 22d day of February, 1819. By the 2d article "his catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida."

The 8th article stipulates, that "all the grants of land made before the 24th of January, 1818, by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty."

The Court will not attempt to conceal the difficulty which is created by these articles.

It is well known that Spain had uniformly main-

tained her construction of the treaty of St. Ildefonso. His catholic majesty had perseveringly insisted that no part of West Florida had been ceded by that treaty, and that the whole country which had been known by that name still belonged to him. It is then a fair inference from the language of the treaty, that he did not mean to retrace his steps, and relinquish his pretensions; but to cede on a sufficient consideration all that he had claimed as his; and consequently, by the 8th article, to stipulate for the confirmation of all those grants which he had made while the title remained in him.

But the United States had uniformly denied the title set up by the crown of Spain; had insisted that a part of West Florida had been transferred to France by the treaty of St. Ildefonso, and ceded to the United States by the treaty of April, 1803; had asserted this construction by taking actual possession of the country; and had extended its legislation over it. The United States therefore cannot be understood to have admitted that this country belonged to his catholic * majesty, or that it passed from him to them by this article. Had his catholic majesty ceded to the United States "all the territories situated to the eastward of the Mississippi known by the name of East and West Florida," omitting the words "which belong to him," the United States, in receiving this cession, might have sanctioned the right to make it, and might have been bound to consider the 8th article as co-extensive with the second. The stipulation of the 8th article might have been

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construed to be an admission that West Florida to its full extent was ceded by this treaty.

But the insertion of these words materially affects the construction of the article. They cannot be rejected as surplusage. They have a plain meaning, and that meaning can be no other than to limit the extent of the cession. We cannot say they were inserted carelessly or unadvisedly, and must understand them according to their obvious import.

It is not improbable that terms were selected which might not compromise the dignity of either government, and which each might understand, consistently with its former pretensions. But if a court of the United States would have been bound under the state of things existing at the signature of the treaty, to consider the territory then composing a part of the state of Louisiana as rightfully belonging to the United States, it would be difficult to construe this article into an admission that it belonged rightfully to his catholic majesty.

The 6th article of the treaty may be considered in connection with the second. The 6th stipulates "that the inhabitants of the territories which his catholic majesty cedes to the United States by this treaty, shall be incorporated in the union of the United States, as soon as may be consistent with the principles of the federal constitution."

This article, according to its obvious import, extends to the whole territory which was ceded. The stipulation for the incorporation of the inhabitants of the ceded territory into the union, is co-exten-

sive with the cession. But the country in which the land in controversy lies, was already incorporated into the union. It composed a part of the
*312 * state of Louisiana, which was already a member of the American confederacy.

A part of West Florida lay east of the Perdido; and to that the right of his catholic majesty was acknowledged. There was, then, an ample subject on which the words of the cession might operate, without discarding those which limit its general expressions.

Such is the construction which the Court would put on the treaties by which the United States have acquired the country east of New Orleans. But an explanation of the 8th article seems to have been given by the parties which may vary this construction.

It was discovered that three large grants, which had been supposed at the signature of the treaty to have been made subsequent to the 24th of January, 1818, bore a date anterior to that period. Considering these grants as fraudulent, the United States insisted on an express declaration annulling them. This demand was resisted by Spain; and the ratification of the treaty was for some time suspended. At length his catholic majesty yielded, and the following clause was introduced into his ratification: "Desirous at the same time of avoiding any doubt or ambiguity concerning the meaning of the 8th article of the treaty, in respect to the date which is pointed out in it as the period for the confirmation of the grants of lands in the Floridas made by me, or by the

competent authorities in my royal name, which point of date was fixed in the positive understanding of the three grants of land made in favor of the duke of Alagon, the count of Punon Rostro, and Don Pedro de Vargas, being annulled by its tenor; I think it proper to declare, that the said three grants have remained and do remain entirely annulled and invalid; and that neither the three individuals mentioned, nor those who may have title or interest through them, can avail themselves of the said grants at any time or in any manner; under which explicit declaration, the said 8th article is to be understood as ratified." One of these grants, that to Vargas, lies west of the Perdido.

It has been argued, and with great force, that this explanation forms a part of the article. It may be considered * as if introduced into it as a proviso or exception to the stipulation, in favour of grants anterior to the 24th of January, 1818. The article may be understood as if it had been written, that "all the grants of land made before the 24th of January, 1818, by his catholic majesty or his lawful authorities in the said territories, ceded by his majesty to the United States (except those made to the duke of Alagon, the count of Punon Rostro and Don Pedro de Vargas), shall be ratified and confirmed, &c."

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Had this been the form of the original article, it would be difficult to resist the construction that the excepted grants were withdrawn from it by the exception, and would otherwise have been within its provisions.

Consequently, that all other fair grants within the time specified, were as obligatory on the United States as on his catholic majesty.

One other judge and myself are inclined to adopt this opinion. The majority of the Court, however, think differently. They suppose that these three large grants being made about the same time, under circumstances strongly indicative of unfairness, and two of them lying east of the Perdido, might be objected to on the ground of fraud common to them all; without implying any opinion that one of them, which was for lands lying within the United States, and most probably in part sold by the government, could have been otherwise confirmed. The government might well insist on closing all future controversy relating to these grants, which might so materially interfere with its own rights and policy in its future disposition of the ceded lands; and not allow them to become the subject of judicial investigation, while other grants, though deemed by it to be invalid, might be left to the ordinary course of the law. The form of the ratification ought not, in their opinion, to change the natural construction of the words of the 8th article, or extend them to embrace grants not otherwise intended to be confirmed by it. An extreme solicitude to provide against injury or inconvenience, from the known existence of such large grants, by insisting upon a declaration of their absolute nullity, can in their opinion furnish no satisfactory proof that the government meant to recognize *the small grants as valid, which in every previous

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act and struggle it had proclaimed to be void, as being for lands within the American territory.

Whatever difference may exist respecting the effect of the ratification, in whatever sense it may be understood, we think the sound construction of the eighth article will not enable this Court to apply its provisions to the present case. The words of the article are, that "all the grants of land made before the 24th of January, 1818, by his catholic majesty, &c., shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty." Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the

treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

The article under consideration does not declare that all the grants made by his catholic majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which

*315 * were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject. Congress appears to have understood this article as it is understood by the Court. Boards of commissioners have been appointed for East and West Florida, to receive claims for lands; and on their reports titles to lands not exceeding ——acres have been confirmed, and to a very large amount. On the 23d of May, 1828, an act was passed supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida; the 6th section of which enacts, that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United

States of the 22d of February, 1819, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and which have not been reported as antedated or forged, &c., shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant," &c. Provided, that nothing in this section shall be construed to enable the judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the king of Spain, nor any claim not presented to the commissioners or register and receiver. An appeal is allowed from the decision of the judge of the district to this Court. No such act of confirmation has been extended to grants for lands lying west of the Perdido.

The act of 1804, erecting Louisiana into two territories, has been already mentioned. It annuls all grants for lands in the ceded territories, the title whereof was at the date of the treaty of St. Ildefonso in the crown of Spain. The grant in controversy is not brought within any of the exceptions from the enacting clause.

*316 * The legislature has passed many subsequent acts previous to the treaty of 1819, the object of which was to adjust the titles to lands in the country acquired by the treaty of 1803.

They cautiously confirm to residents all incomplete titles to lands, for which a warrant or order of survey had been obtained previous to the 1st of October, 1800.

An act, passed in April, 1814, confirms incomplete titles to lands in the state of Louisiana, for which a warrant or order of survey had been granted prior to the 20th of December, 1803, where the claimant or the person under whom he claims was a resident of the province of Louisiana on that day, or at the date of the concession, warrant, or order of survey, and where the tract does not exceed 640 acres. This act extends to those cases only which had been reported by the board of commissioners; and annexes to the confirmation several conditions, which it is unnecessary to review, because the plaintiff does not claim to come within the provisions of the Act.

On the 3d of March 1819, congress passed an act confirming all complete grants to land from the Spanish government, contained in the reports made by the commissioners appointed by the president for the purpose of adjusting titles which had been deemed valid by the commissioners; and also all the claims reported as aforesaid, founded on any order of survey, request, permission to settle, or any written evidence of claim derived from the Spanish authorities, which ought in the opinion of the commissioners to be confirmed; and which by the said reports appear to be derived from the Spanish government before the 20th day of December, 1803, and the land claimed to have been cultivated or inhabited on or before that day.

Though the order of survey in this case was granted before the 20th of December, 1803, the plaintiff does not bring himself within this act.

Subsequent acts have passed in 1820, 1822, and

1826, but they only confirm claims approved by the commissioners, among which the plaintiff does not allege his to have been placed.

Congress has reserved to itself the supervision of the titles * reported by its commissioners, and has confirmed those which the commissioners have approved, but has passed no law withdrawing grants generally for lands west of the Perdido from the operation of the 14th section of the act of 1804, or repealing that section.

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We are of opinion, then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed with costs.

Weston

v.

Charleston.

NOTE.

This case arose on a suggestion for a writ of prohibition filed in the Court of Common Pleas of Charleston, South Carolina, to prohibit the collection of a tax laid by city ordinance on certain stocks, including interest bearing stock issued by the United States, on the ground that such action, though authorized by the State, was unconstitutional since it hampered the federal power "to borrow money on the credit of the United States," a power expressly given to Congress by the Constitution. The writ was granted, but the decision of the Common Pleas was reversed by the Constitutional Court (of South Carolina), and from that opinion this appeal was taken to the Supreme Court of the United States.

In *M'Culloch* v. *Maryland* (4 Wheaton, 316, and *supra*, I, 307) Marshall had decided that a state tax on the operation of a national bank was unconstitutional and had laid down the famous doctrine that the state power to tax was a power to destroy and hence could not operate on the federal instruments of government,—he had made it a question of the supremacy of clashing powers. And in *Osborn* v. *Bank of the United States* (9 Wheaton 738, and *supra*, II, 87) the same doctrine was vigorously reaffirmed. On that doctrine Marshall based his opinion in this case, deciding that the Charleston tax on the instrument of federal power

was unconstitutional. The decision has been always followed and is unquestioned law.

But there is a difference between those cases and *Weston* v. *Charleston* which has come out strongly in the later cases. The taxes in question in the M'Culloch case and the Osborn case were clearly and flagrantly discriminating taxes on the operation of the federal power, aimed at it, and designed to cripple it. There is, however, nothing to show that the tax here in question was anything of the sort. Interest bearing stocks were taxed, among them United States stocks, but why should not so much of the wealth of Charleston as was invested in United States stocks be taxed as well as any other form of wealth? There was nothing in the language of the legislation creating the United States stock to show it carried this exemption from taxation; such a tax would it is true make the stock less attractive as an investment, but until it became a descrimination the tax could not fairly be said to destroy, or to attempt to destroy, the instrument of federal power. All that line of reasoning Marshall brushes aside. It is true that the tax in this case named United States stock particularly, but the opinion does not go upon that ground and it has since been decided to be unimportant (*Bank of Commerce* v. *New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall., 200). The burden of this doctrine has been borne unwillingly by the States and method after method has been unsuccessfully devised to tax United States securities and National Bank securities, and now by United States statutes stock of National Banks is taxable by the States. It is not easy to say that the decision of *Weston* v. *Charleston* was wise or unwise; perhaps an exemption from State taxation was a most valuable instrument in establishing the national debt, but surely the decision does not seem to have been an essential one, or a clear one; here as always Marshall, perhaps with that greater wisdom, leaned toward the strengthening of the national power.

The difficulties of the doctrine come up most clearly in attempts to create exemptions from State taxation for certain indirect instruments of federal power—such as corporations engaged in interstate commerce, railroads and telegraphs, indirect governmental agencies, or corporations in which the government

was indirectly interested, as the Pacific railroads. In these cases the Supreme Court has been obliged to curb the doctrine and to limit its application. These questions arose in the case of *Thompson* v. *Pacific Railroad*, 9 Wall., 579, where an attempt was made to tax the real estate of the Union Pacific Railroad. The Union Pacific was then a government instrument in so far that it had received government loans, and the government held stock in it, and in so far that it was the agent for the transmission of the mail, telegraph messages, supplies, etc., for the government. The Supreme Court held the tax valid as a tax on an indirect government instrument, and a tax on property of the instrument not on the instrument itself. The questions came up again in *Railroad Co.* v. *Peniston*, 18 Wall., 5. Then the Union Pacific Company had been reorganized and was chartered under an act of Congress. The government was part owner of the road, the President appointed certain of its directors, and the government had a preference over all other customers for its service. The vigorous opinion of Judge Strong in that case, while recognizing the authority of Marshall's opinions, revamps the whole doctrine on which those opinions rest, producing the doctrine that a tax by a State acting directly on a governmental instrument as such, and hampering it, was invalid, but that beyond such cases the property used in carrying out government instrumentalities, and even the instrumentalities themselves, were taxable when not directly so employed. From that opinion Judge Bradley dissented, thinking *Weston* v. *Charleston* conclusive, as indeed it was if its reasoning is to be exactly followed. In *Knowlton* v. *Moore*, 178 U. S., 1, 59 the Supreme Court restated the doctrine that the States had no power to tax exclusive instrumentalities of the national government, and the national government had no power to tax the exclusive instrumentalities of the State governments,—following Judge Strong's theory that it was a necessary implication from the complex form of government created by the Constitution that the main instruments and functions of the separate governing bodies should be mutually free from interference. That is, in substance, very different from the broad doctrines of Marshall. In *Smyth* v. *Ames*, 169 U. S., 466, 521, 522, the Supreme Court construed an

act of the United States authorizing a Pacific railroad as containing no implication that this government instrument should be free from State regulation as to rates for carrying freight. That is so far from Marshall's theories as almost to establish the doctrine that a government agency presumptively may be taxed by the States if there is nothing in the statute creating it which denied such a right. And, in the present condition of our government, that would seem to be the wiser doctrine. Still the doctrine of *Weston* v. *Charleston*, though narrowed, is law, still a franchise granted by the United States cannot be taxed, as such, by a State, still the phrase "the power to tax is the power to destroy" has a magic, if misleading, power. The growth of the doctrine is a curious example of the cases where Marshall laid down doctrines in support of the federal power with a breadth and emphasis which the later experience of the Supreme Court has led it to modify greatly. As a matter of constitutional interpretation, it would seem the later doctrines are the sounder, yet Marshall's theories were vital to the federal power and they are usually applauded as the course of political wisdom.

Beside the main question on the merits in this case of *Weston* v. *Charleston* there first arose questions as to the right of appeal to the Supreme Court under the judicial act establishing that court and limiting its powers. Here also Marshall's vigorous assertion of the broad scope of the work of the federal courts is characteristic.

Weston and others

v.

City of Charleston.

[2 Peters, 449]

1829.

Mr. Robert Y. Hayne for plaintiffs in error. Messrs. Henry N. Cruger and Hugh S. Legare contra.

Mr. Chief Justice MARSHALL delivered the opinion of the Court:

This case was argued on its merits at a preceding term; but a doubt having arisen with the Court respecting its jurisdiction in cases of prohibition, that doubt was suggested to the bar, and a reargument was requested. It has been reargued at this term.

The power of this Court to revise the judgments of a state tribunal depends on the twenty-fifth section of the judicial act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had," "where is drawn in question the validity of a statute, or of an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their

validity," "may be re-examined and reversed or affirmed in the Supreme Court of the United States."

In this case the city ordinance of Charleston is the exercise of an "authority under the state of South Carolina," * "the validity of which has been drawn in question on the ground of its being repugnant to the constitution," and "the decision is in favor of its validity." The question, therefore, which was decided by the constitutional court, is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?

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The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his suggestion a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and, in the highest court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit.

We think also that it was a final judgment, in the sense in which that term is used in the twenty-fifth section of the judicial act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the constitution, laws, or treaties of the United States, would not be subject to the revision of this Court. A prohibition might issue, restraining a collector from collecting duties, and this Court would not revise and correct the judgment. The word "final" must be understood in the section under consideration as

*465 apply*ing to all judgments and decrees which determine the particular cause.

We think, then, that the writ of error has brought the cause properly before this Court.

This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by states and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract

the instant it is framed, and must imply a right to affect that contract.

If the states and corporations throughout the union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle though its diversified application to all the contracts and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every

*466 state and every corporation in * the union, which possesses the right of taxation, to burden the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interest certainly, perhaps the liberty, of the whole may depend, may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours with one supreme government for national purposes and numerous state governments for other purposes, in many respects independent and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise is, undoubtedly, among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this Court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot rightfully

be so exercised as to impede and obstruct the free course of those measures which the government of the states united may rightfully adopt.

This subject was brought before the court in the case of *M'Cullough* vs. *The State of Maryland*,[1] when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that * which is involved in this. It was discussed at the bar in all its relations and examined by the Court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that "all subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation." "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the union, in pursuance of the constitution, is itself an abuse because it is the usurpation of a power which the people of a single state cannot give."

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The Court said in that case that "the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by congress to carry into

[1] 4 Wheaton, 316.

execution the powers vested in the general government."

We retain the opinions which were then expressed. A contract made by the government, in the exercise of its power, to borrow money on the credit of the United States, is, undoubtedly, independent of the will of any state in which the individual who lends may reside, and is, undoubtedly, an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *M'Cullough* vs. *State of Maryland*, to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from states.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate *connexion which exists between these two modes of acting on the subject.

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It is not the want of original power in an independent sovereign state, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing

money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power; and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight, when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connexion remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold, are in the condition of money borrowed and repaid. Its liability to taxation, in any form it

may then assume, is not questioned. The connexion between the borrower and lender is dissolved. It is no burthen on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. * But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the government has sold.

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"The Federalist" has been quoted in the argument, and an eloquent and well merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of *M'Cullough* vs. *The state of Maryland,* and was considered by the Court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the exceptions stated in the case of *M'Cullough* vs. *The state of Maryland.* We do not think so. The bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a state was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and, consequently, to be repugnant to the constitution.

We are, therefore, of opinion that the judgment of the constitutional court of the state of South Carolina, reversing the order made by the court of common pleas, awarding a prohibition to the city council of Charleston to restrain them from levying a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this; that the said constitutional court adjudged that the said ordinance was not repugnant to the constitution of the United States; whereas, this Court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the constitutional court for the state of South Carolina, that farther proceedings may be had therein according to law.

Craig *v.* Missouri.

NOTE.

This case came up on writ of error to the Supreme Court of the State of Missouri. The action was brought by the State of Missouri on a certain loan office certificate, issued in 1822, under the laws of the State, by which the individual defendants agreed to pay certain sums loaned by the State. Judgment was given for the State and from that judgment Craig and his fellow-defendants appealed on the ground that the law authorizing these loan certificates was unconstitutional, because repugnant to the provision of the Constitution of the United States reading: "No State shall . . . emit bills of credit." Marshall's opinion considers in detail the nature of these loan office certificates. The law in question provided for the establishment of State loan offices, at which loans were made to citizens of the State on security. The certificates evidencing such loans were, by the statute, in denomination from ten dollars to fifty cents, and were made receivable for taxes and debts to the State, and for salaries and fees of State officers; they bore interest at two per cent.; they were further secured by the pledge of the faith of the State and its income from its salt lands, and there was a provision for the annual withdrawal from circulation of a certain portion of the outstanding certificates

These certificates the Supreme Court declared "bills of credit" and so void. The opinion is short, clear, and decisive. Brushing aside all excuse, Marshall declared the clear intention of the act to create a State paper currency to pass as money, and that such State paper money was invalid, legal tender or no legal tender.

The decision is a curious example of the austerity of Marshall's judicial conduct. The State of Missouri had not taken up the device of loan office certificates save out of necessity, nor was she alone in such devices. It is necessary to remember for a moment the financial condition of the Western States like Missouri at the time the law was passed. Specie payment had been resumed in 1817, the new Bank of the United States had just started under weak management and a defective charter to furnish a stable financial system and a suitable currency. In 1819 it was on the verge of bankruptcy.[1] A period of extensive and ill-judged speculation in Western lands had just come to an untimely, if natural, end, on every hand it was a period of hard times and commercial crisis—a general liquidation followed, lasting four or five years. The Bank of the United States, which was meant to cure the evils, made them worse by forming a channel for the constant flow of currency from the South and West to the East.[2]

The national system of currency was utterly inadequate and the national government could not act. Something had to be done to relieve the debtor communities of the South and West. It was a case where if the Constitution stood in the way of curing distress in Missouri so much the worse for the Constitution.

But there is not a word or a hint of this in Marshall's opinion. He decided in accordance with his idea of the Constitution, and the knowledge that the law before him had been passed to relieve a financial panic had no reflection in his opinion.

[1] *History of Modern Banks of Issue*, C. A. Conant. Putnams, 1896. At p. 298.

[2] McMasters says, (*History of the United States*. D. Appleton, 1895. Vol. iv., at p. 510.):

"The banks suspended, and, as their paper had driven out specie, no circulating medium existed. The taxes were not paid. Debts were not settled, and neither land, labor, nor produce was salable. Happily for the people, Missouri at this crisis became a State, and, as its acts were no longer subject to revision by Congress, the Legislature gave speedy relief. Stay laws were passed, and a State paper money created."

The conditions are graphically described in the *Life of Andrew Jackson* (American Statesmen Series) by W. G. Sumner. Houghton & Mifflin, 1894.

The attitude of the dissenting judges in Marshall's court, Johnson, Thompson, and McLean, in this case accentuates the character of Marshall's clear and vigorous opinion. Justice Johnson thought the issue of the loan certificates so far "amphibious," as being both a paper currency and an exercise of the State's borrowing power, as to be most doubtful, and in this doubtful case deemed the law constitutional. Justice Thompson deemed only a "bill of credit" a bill resting only on the faith of a State without any particular fund for its redemption. Justice McLean adopted a similar view and thought the aim of the bill "to furnish the citizens of Missouri with the means of paying to the state the taxes which it imposed and the other debts due it." He advocated in his dissent a policy of "mutual forbearance" between the States and the Union, in the matter of deciding on the division of powers. The difference in the attitude of these dissenting judges—particularly the last—from the position that Marshall took is significant.

There could be no question that Marshall's doctrine in this case challenged the right of the State banks to issue notes to circulate as currency, and a few years later a case involving that point was brought before the Supreme Court in *Briscoe* v. *Bank of Kentucky*. On the first argument of that case the court were unable to reach a conclusion. Before the second argument in 1836, Marshall had died and the court had changed. Five out of the seven judges were appointees of President Jackson, and McLean, who had dissented in the *Craig* case, was chosen to deliver the opinion. It is reported in 11 Peters, 257, and though it purports to be consistent with the *Craig* case it is flatly opposed to it. It decides the State Bank of Kentucky issues constitutional, as based on and secured by some definite fund, and not resting merely on the credit of the State.

In that case Justice Story gave an earnest dissenting opinion, insisting that the case was directly within the doctrine of the *Craig* case, and voicing, as he stated, the opinion of Marshall. The law laid down in *Briscoe* v. *Bank of Kentucky* has since been the law of the Supreme Court, though the decisions on that doctrine have not since then been of vital political or economic effect.

The latest exposition by the Supreme Court as to the meaning of the term "bills of credit" was in the case of *Houston and Texas Central Rd. Co.* v. *Texas*, 177 U. S., 66. There a warrant drawn by State authorities in payment of legislative appropriations, when payable on presentation if there were funds in the State treasury, was held not to be a "bill of credit," as it was not clear that it was intended to circulate as money, though Mr. Justice Brown dissented strongly on this point, deeming it in flat conflict with the doctrines of *Craig* v. *Missouri*. A similar departure from the *Craig* case took place in *Pointdexter* v. *Greenhow*, 114 U. S., 270–283.

It can hardly be controverted that the Supreme Court since Marshall's time has found *Craig* v. *Missouri* too strict and too clear for any but nominal adherence, and the case must be placed among the very few where Marshall's doctrines have been departed from.

The course of wild-cat banking in the States after the *Briscoe* case up to the Rebellion would seem to show the wisdom of Marshall's view.[1]

On the final question as to the correctness of the opinion, from the point of view of interpretation, there must always be the greatest doubt. Such is the magic of Marshall's name that the majority of lawyers would deem him right and the dissenting judges wrong, yet the words "bills of credit" are slender to be so pregnant with meaning as he made them. But there can be no question of the vigor and constructive statesmanship of Marshall's opinion, or of the far-sightedness that made him lay down a doctrine of construction that, as it limited the States, galled for the moment, but would have benefited for decades.

[1] Professor Sumner has spoken eloquently of the judicial service and the wisdom of the opinion in *Craig* v. *Missouri* in his *Life of Andrew Jackson* (American Statesmen Series. Houghton & Mifflin, 1894), at page 261 *et seq.*

Hiram Craig, John Moore, and Ephraim Moore

v.

The State of Missouri.

[4 Peters, 410.]

1830.

Mr. Sheffey for plaintiffs in error.
Mr. Benton for the State of Missouri.

Mr. Chief Justice MARSHALL delivered the opinion of the Court: Justices Thompson, Johnson, and M'Lean dissenting.

This is a writ of error to a judgment rendered in the court of last resort, in the state of Missouri, affirming a judgment obtained by the state in one of its inferior courts against Hiram Craig and others, on a promissory note.

The judgment is in these words: "And afterwards, at a court," &c., "the parties came into court by their attorneys, and, neither party desiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things being seen and heard by the court, it is found by them that the said defendants did assume upon themselves, in manner and form as the plaintiff by her counsel alleged. And the court

also find that the consideration, for which the writing declared upon and the assumpsit was made, was for the loan of loan-office certificates, loaned by the state at her loan office at Chariton ; which certificates were issued, and the loan made, in the manner pointed out by an act of the legislature of the said state of Missouri, approved the twenty-seventh day of June, 1821, entitled an act for the establishment of loan offices, and the acts amendatory and supplementary thereto ; and the court do further find that the plaintiff has sustained damages by reason of the non-performance of the assumptions and undertakings of them, the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents, and do assess her damages to that sum. Therefore it is considered," &c.

The first inquiry is into the jurisdiction of the court.

The twenty-fifth section of the judicial act declares "that a final judgment or decree, in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity," "may be re-examined, and reversed or affirmed, in the supreme court of the United States."

To give jurisdiction to this court it must appear in the *record, 1. That the validity of a statute of the state of Missouri was drawn in question, on the ground of its being repugnant to the

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constitution of the United States. 2. That the decision was in favour of its validity.

1. To determine whether the validity of a statute of the state was drawn in question, it will be proper to inspect the pleadings in the cause, as well as the judgment of the court.

The declaration is on a promissory note, dated on the first day of August, 1822, promising to pay to the state of Missouri, on the first day of November, 1822, at the loan office in Chariton, the sum of $199.99, and the two per cent. per annum, the interest accruing on the certificates borrowed, from the first of October, 1821. This note is obviously given for certificates loaned under the act for the establishment of loan offices. That act directs that loans on personal securities shall be made of sums less than two hundred dollars. This note is for one hundred and ninety-nine dollars ninety-nine cents. The act directs that the certificates issued by the state shall carry two per cent. interest from the date, which interest shall be calculated on the amount of the loan. The note promises to repay the sum, with the two per cent. interest, accruing on the certificates borrowed, from the 1st day of October, 1821. It cannot be doubted that the declaration is on a note given in pursuance of the act which has been mentioned.

Neither can it be doubted that the plea of non assumpsit allowed the defendants to draw into question, at the trial, the validity of the consideration on which the note was given. Everything which

disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated.

Have they done so?

Had the cause been tried before a jury, the regular course would have been to move the court to instruct the jury that the act of assembly, in pursuance of which the note was given, was repugnant to the constitution of the United States; * and to except to the charge of the judges, if in favour of its validity; or a special verdict might have been found by the jury, stating the act of assembly, the execution of the note in payment of certificates loaned in pursuance of that act, and referring its validity to the court. The one course or the other would have shown that the validity of the act of assembly was drawn into question, on the ground of its repugnancy to the constitution; and that the decision of the court was in favor of its validity. But the one course or the other would have required both a court and jury. Neither could be pursued where the office of the jury was performed by the court. In such a case, the obvious substitute for an instruction to the jury, or a special verdict, is a statement by the court of the points in controversy on which its judgment is founded. This may not be the usual mode of proceeding, but it is an obvious mode; and if the court

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of the state has adopted it, this court cannot give up substance for form.

The arguments of counsel cannot be spread on the record. The points urged in argument cannot appear. But the motives stated by the court on the record for its judgment, and which form a part of the judgment itself, must be considered as exhibiting the points to which those arguments were directed, and the judgment as showing the decision of the court upon those points. There was no jury to find the facts and refer the law to the court; but if the court which was substituted for the jury has found the facts on which its judgment was rendered, its finding must be equivalent to the finding of a jury. Has the court, then, substituting itself for a jury, placed facts upon the record, which, connected with the pleadings, show that the act in pursuance of which this note was executed was drawn into question, on the ground of its repugnancy to the constitution?

After finding that the defendants did assume upon themselves, &c., the court proceeds to find "that the consideration, for which the writing declared upon and the assumpsit was made, was the loan of loan-office certificates loaned by the state at her loan office at Chariton; which certificates were issued, and the loan made, in the manner pointed out * by an act of the legislature of the said state of Missouri, approved the 27th of June, 1821, entitled," &c.

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Why did not the court stop immediately after the usual finding that the defendants assumed upon

themselves? Why proceed to find that the note was given for loan-office certificates issued under the act contended to be unconstitutional, and loaned in pursuance of that act, if the matter thus found was irrelevant to the question they were to decide?

Suppose the statement made by the court to be contained in the verdict of a jury which concludes with referring to the court the validity of the note thus taken in pursuance of the act; would not such a verdict bring the constitutionality of the act, as well as its construction, directly before the court? We think it would; such a verdict would find that the consideration of the note was loan-office certificates, issued and loaned in the manner prescribed by the act. What could be referred to the court by such a verdict but the obligation of the law? It finds that the certificates for which the note was given were issued in pursuance of the act, and that the contract was made in conformity with it. Admit the obligation of the act, and the verdict is for the plaintiff; deny its obligation, and the verdict is for the defendant. On what ground can its obligation be contested but its repugnancy to the constitution of the United States? No other is suggested. At any rate it is open to that objection. If it be, in truth, repugnant to the constitution of the United States, that repugnancy might have been urged in the state, and may, consequently, be urged in this court; since it is presented by the facts in the record, which were found by the court that tried the cause.

It is impossible to doubt that, in point of fact, the

constitutionality of the act, under which the certificates were issued that formed the consideration of this note, constituted the only real question made by the parties, and the only real question decided by the court. But the record is to be inspected with judicial eyes; and as it does not state in express terms that this point was made, in has been contended that this court cannot assume the fact that it was made or determined in the tribunal of the state.

*429 *The record shows distinctly that this point existed, and that no other did exist; the special statement of facts made by the court, as exhibiting the foundation of its judgment, contains this point and no other. The record shows clearly that the cause did depend, and must depend, on this point alone. If in such a case the mere omission of the court of Missouri to say, in terms, that the act of the legislature was constitutional, withdraws that point from the cause, or must close the judicial eyes of the appellate tribunal upon it, nothing can be more obvious than that the provisions of the constitution, and of an act of congress, may be always evaded; and may be often, as we think they would be in this case, unintentionally defeated.

But this question has frequently occurred; and has, we think, been frequently decided in this court. *Smith* vs. *The State of Maryland*, 6 Cranch, 286; *Martin* vs. *Hunter's Lessee*, 1 Wheat. 355; *Miller* vs. *Nicholls*, 4 Wheat. 311; *Williams* vs. *Norris*, 12 Wheat. 117; *Willson et al* vs. *The Black Bird Creek Marsh Company*, 2 Peters, 245, and *Harris* vs. *Dennie*, in

this term ; are all, we think, expressly in point. There has been perfect uniformity in the construction given by this court to the twenty-fifth section of the judicial act. That construction is that it is not necessary to state, in terms, on the record, that the constitution, or a treaty, or law of the United States has been drawn in question, or the validity of a state law, on the ground of its repugnancy to the constitution. It is sufficient if the record shows that the constitution, or a treaty, or law of the United States must have been construed, or that the constitutionality of a state law must have been questioned ; and the decision has been in favour of the party claiming under such law.

We think, then, that the facts stated on the record presented the question of repugnancy between the constitution of the United States and the act of Missouri to the court for its decision. If it was presented, we are to inquire :

2. Was the decision of the court in favor of its validity ?

The judgment in favor of the plaintiff is a decision in favor of the validity of the contract, and consequently of * the validity of the law by the authority of which the contract was made.

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The case is, we think, within the twenty-fifth section of the judicial act, and, consequently, within the jurisdiction of this court.

This brings us to the great question in the cause : Is the act of the legislature of Missouri repugnant to the constitution of the United States ?

The counsel for the plaintiffs in error maintain that it is repugnant to the constitution, because its object is the emission of bills of credit contrary to the express prohibition contained in the tenth section of the first article.

The act under the authority of which the certificates loaned to the plaintiffs in error were issued was passed on the 26th of June, 1821, and is entitled "an act for the establishment of loan offices." The provisions that are material to the present inquiry are comprehended in the third, thirteenth, fifteenth, sixteenth, twenty-third and twenty-fourth sections of the act, which are in these words:

Section the third enacts, "that the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to, issue certificates, signed by the said auditor and treasurer, to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: "This certificate shall be receivable at the treasury, or any of the loan offices, of the state of Missouri, in the discharge of taxes or debts due to the state, for the sum of $——, with interest for the same, at the rate of two per cent. per annum from this date, the——day of——, 182 ."

The thirteenth section declares, "that the certificates of the said loan office shall be receivable at the treasury of the state, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the state or to any county or town

therein, and the said certificates shall also be received by all officers civil and military in the state, in the discharge of salaries and fees of office."

The fifteeenth section provides, "that the *commissioners of said loan offices shall have power to make loans of the said certificates to citizens of this state, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," &c.

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Section sixteenth, "That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient, for sums less than two hundred dollars; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon," &c.

Section twenty-third, "That the general assembly shall, as soon as may be, cause the salt springs and lands attached thereto, given by congress to this state, to be leased out, and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interest accruing to the state, and all estates purchased by officers of the said several offices, under the provisions of this act, and all the debts now due or hereafter to be due to this state, are hereby pledged and constituted a fund for the redemption of the certificates hereby required

to be issued, and the faith of the state is hereby also pledged for the same purpose."

Section twenty-fourth, "That it shall be the duty of the said auditor and treasurer to withdraw annually from circulation one-tenth part of the certificates which are hereby required to be issued," etc.

The clause in the constitution which this act is supposed to violate is in these words: "No state shall" "emit bills of credit."

What is a bill of credit? What did the constitution mean to forbid?

In its enlarged and, perhaps, its literal sense, the term "bill of credit" may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. But the lan *guage of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit" conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

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At a very early period of our colonial history the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated "bills of credit." During the war of our revolution we were driven to this expedient, and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning, and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States and which deeply affected the interest and prosperity of all, the people declared, in their constitution, that no state should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a state government, for the purpose of common circulation.

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates, signed by the auditor and treasurer of the state, are to be issued by those officers to the *amount of two hundred thousand dollars, of denomina-

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tions not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan office of the state of Missouri, in discharge of taxes or debts due to the state.

The law makes them receivable in discharge of all taxes, or debts due to the state, or any county or town therein; and of all salaries and fees of office to all officers civil and military within the state, and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the state for their redemption.

It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation, that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the constitution.

And can this make any real difference? Is the

proposition to be maintained that the constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

But it is contended, that though these certificates should be * deemed bills of credit according to the common acceptation of the term, they are not so in the sense of the constitution; because they are not made a legal tender.

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The constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case because the same clause of the constitution contains a substantive prohibition to the enactment of tender laws. The constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills

of credit may be emitted if they be not made a tender in payment of debts; is, in effect, to expunge that distinct, independent prohibition and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to for the purpose of showing that its great mischief consists in being made a tender; and that, therefore, the general words of the constitution may be restrained to a particular intent.

Was it even true that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves either that being made a tender in payment of debts is an essential quality of bills of credit or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorise a court to convert a general into a particular prohibition.

We learn from Hutchinson's History of Massachusetts, vol. 1, p. 402, that bills of credit were emitted for the first time in that colony in 1690. An army returning unexpectedly from an expedition against Canada, which had proved as disastrous as the plan was magnificent, found the govern* ment totally unprepared to meet their claims. Bills of credit were resorted to for relief from this embarrassment. They do not appear to have been

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made a tender; but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon redeemed, the experiment would have been productive of not much mischief had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the north and south; and whether made a tender or not was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions, under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made a tender; but they circulated together; were equally bills of credit; and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776, an additional emission was made and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together, were equally bills of credit, and were productive of the same consequences.

Congress emitted bills of credit to a large amount; and did not, perhaps could not, make them a legal tender. This power resided in the states. In May,

1777, the legislature of Virginia passed an act, for the first time, making the bills of credit issued under the authority of congress a tender, so far as to extinguish interest. It was not until March, 1781, that Virginia passed an act making all the bills of credit which had been emitted by congress, and all which had been emitted by the state, a legal tender in payment of debts. Yet they were in every sense of the word bills of credit previous to that time, and were productive of all the consequences of paper money. We cannot, then, assent to the proposition,
*436 * that the history of our country furnishes any just argument in favor of that restricted construction of the constitution for which the counsel for the defendant in error contends.

The certificates for which this note was given being in truth "bills of credit" in the sense of the constitution, we are brought to the inquiry:

Is the note valid of which they form the consideration?

It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the constitution of the United States, which is the supreme law, is against law. Now the constitution forbids a state to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them, while they lie in the loan offices, but the issuing of them, the putting them into circulation, which is the act of emission; the act

that is forbidden by the constitution. The consideration of this note is the emission of bills of credit by the state. The very act which constitutes the consideration is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the constitution of the United States.

Cases which we cannot distinguish from this in principle have been decided in state courts of great respectability, and in this court. In the case of *The Springfield Bank* vs. *Merrick et al.*, 14 Mass. Rep. 322, a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in consideration of these bills, instead of being made payable in them, it would not have been less repugnant to the statute; and would, consequently, have been equally void.

In *Hunt* vs. *Knickerbocker*, 5 Johns. Rep., 327, it was decided that an agreement for the sale of tickets in a lottery not authorized by the legislature of the state, although instituted under the authority of the government of another state, is contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void. The books, both of * Massachusetts and New York, abound with cases to the same effect. They turn upon the question whether the particular case is within the principle, not on the principle itself. It has never been doubted that a note given on a con-

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sideration which is prohibited by law, is void. Had the issuing or circulation of certificates of this or of any other description been prohibited by a statute of Missouri, could a suit have been sustained in the courts of that state on a note given in consideration of the prohibited certificates? If it could not, are the prohibitions of the constitution to be held less sacred than those of a state law?

It had been determined, independently of the acts of congress on that subject, that sailing under the license of an enemy is illegal. *Patton* vs. *Nicholson*, 3 Wheat., 204, was a suit brought in one of the courts of this district on a note given by Nicholson to Patton, both citizens of the United States, for a British license. The United States were then at war with Great Britain; but the license was procured without any intercourse with the enemy. The judgment of the circuit court was in favor of the defendant, and the plaintiff sued out a writ of error. The counsel for the defendant in error was stopped, the court declaring that the use of a license from the enemy being unlawful, one citizen had no right to purchase from or sell to another such a license to be used on board an American vessel. The consideration for which the note was given being unlawful, it followed, of course, that the note was void.

A majority of the court feels constrained to say that the consideration on which the note in this case was given is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the state of

Missouri decided in favor of the validity of a law which is repugnant to the constitution of the United States.

In the argument, we have been reminded by one side of the dignity of a sovereign state; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States; * who have spoken their will in terms which we cannot misunderstand.

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To these admonitions we can only answer: that if the exercise of that jurisdiction which has been imposed upon us by the constitution and laws of the United states shall be calculated to bring on those dangers which have been indicated: or if it shall be indispensable to the preservation of the union, and, consequently of the independence and liberty of these states; these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law; and can tread only that path which is marked out by duty.

The judgment of the supreme court of the state of Missouri for the first judicial district is reversed; and the cause remanded, with directions to enter judgment for the defendants.

Providence Bank

v.

Billings.

NOTE.

The facts and the law of this case are set out so clearly in the opinion as to need no comment. The point decided has never been doubted in any subsequent decision. In truth the case seems to have been a mere venture of the Providence Bank to evade taxation, having no greater basis than some possibly ambiguous language in Marshall's earlier decisions. It is almost unthinkable that any court could have decided in favor of the Bank in this case, but the case has served to limit an unwarrantable extension of the Dartmouth College case.

The Providence Bank

v.

Alpheus Billings and Thomas G. Pittman.

[4 Peters 514.]

1830.

Mr. Whipple for the plaintiffs in error, Mr. Hazzard and Mr. Jones contra.

Mr. Chief Justice MARSHALL delivered the opinion of the Court:

This is a writ of error to a judgment rendered in the highest court for the state of Rhode Island, in an action of trespass brought by the plaintiff in error against the defendant.

In November, 1791, the legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated themselves together for the purpose of forming a banking company. They are incorporated by the name of the "President, Directors, and Company of the Providence Bank;" and have the ordinary powers which are supposed to be necessary for the usual objects of such associations.

In 1822 the legislature of Rhode Island passed "an act imposing a duty on licensed persons and others,

and bodies corporate within the state;" in which, among other things, it is enacted "that there shall be paid, for the use of the state, by each and every bank within the state, except the Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in." This tax was afterwards augmented to one dollar and twenty-five cents.

The Providence Bank, having determined to resist the payment of this tax, brought an action of trespass against the officers, by whom a warrant of distress was issued against and served upon the property of the bank in pursuance of the law. The defendants justify the taking, set out in the declaration, under the act of assembly imposing the tax; to which plea the plaintiffs demur, and assign for cause of demurrer that the act is repugnant to the constitution of the United States, inasmuch as it impairs the obligation of the contract created by their charter of incorporation. Judg*ment was given by the court of common pleas in favour of the defendants; which judgment was, on appeal, confirmed by the supreme judicial court of the state. That judgment has been brought before this court by a writ of error.

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It has been settled that a contract entered into between a state and an individual is as fully protected by the tenth section of the first article of the constitution as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the state?

This question is to be answered by the charter itself.

It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs complain. No words have been found in the charter which, in themselves, would justify the opinion that the power of taxation was in the view of either of the parties; and that an exemption of it was intended, though not expressed. The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument which has been urged amounts, in substance, to this: The charter authorizes the bank to employ its capital in banking transactions, for the benefit of the stockholders. It binds the state to permit these transactions for this object. Any law arresting directly the operations of the bank would violate this obligation, and would come within the prohibition of the constitution. But, as that cannot be done circuitously which may not be done directly, the charter restrains the state from passing any act which may indirectly destroy the profits of the bank. A power to tax the bank may, unquestionably, be carried to such an excess as to take all its profits, and still more than its profits, for the use of the state; and, consequently, destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends not on the degree of its exercise, but on its principle.

A power, therefore, which may, in effect, destroy the charter, is inconsistent with it, and is impliedly renounced by granting it. Such a power cannot be exercised without im * pairing the obligation of the contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed on various occasions by this court, in support of these positions.

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The claim of the Providence Bank is certainly of the first impression. The power of taxing moneyed corporations has been frequently exercised; and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear.

The plaintiffs would give to this charter the same

construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be implied; because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said with equal truth of other legislative powers? Does it not also apply with equal force to every incorporated company? A company may be incorporated for the purpose of trading in goods as well as trading in money. If the policy of the state should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption, in virtue of a charter which does not indicate such an intention? The time may come when a duty may be imposed on * manufactures. Would an incorporated company be exempted from this duty as the mere consequence of its charter?

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The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given, it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the

objects for which every other charter is given. If the grant of a power to trade in money to a given amount implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits, then the grant of any other thing implies the same exemption, for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has in many, perhaps in all, the states been granted by government since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all, and the proposition appears so extravagant that it is difficult to admit any resemblance in the cases. And yet, if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant, and is, therefore, impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal, and therefore its truth cannot be admitted, in these broad terms, in any case. We must look for the exemption in the language of the instrument, and, if we do *not find it there, it would be going very far to insert it by construction.

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The power of legislation, and, consequently, of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved, when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally. This principle was laid down in the case of *M'Cullough* vs. *The State of Maryland*, and in *Osborn et al.* vs. *The Bank of the United States*. Both those cases, we think, proceeded on the admission that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation that an unincorporated company would be, carrying on the same business.

The case of *Fletcher* vs. *Peck* has been cited; but in that case the legislature of Georgia passed an act to annul its grant. The case of the *State of New*

Jersey vs. *Wilson* has been also mentioned; but in that case the stipulation exempting the land from taxation was made in express words.

The reasoning of the court in the case of *M'Cullough* vs. *The State of Maryland* has been applied to this case; but the court itself appears to have provided against this application. Its opinion in that case, as well as in *Osborn et al.* vs. *The Bank of the United States*, was founded expressly on the supremacy of the laws of Congress, and the necessary consequence of that supremacy to exempt its instruments, employ*ed in the execution of its powers, from the operation of any interfering power whatever. In reasoning on the argument that the power of taxation was not confined to the people and property of a state, but might be exercised on every object brought within its jurisdiction, this court admitted the truth of the proposition, and added, that "the power was an incident of sovereignty, and was co-extensive with that to which it was an incident." "All subjects," the court said, "over which the sovereign power of a state extends, are objects of taxation." "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think not."

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So in the case of *Osborn* vs. *The Bank of the United States*, the court said, "the argument" in favour of the right of the state to tax the bank

"supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

"If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, would certainly be subject to the taxing power of the state as any individual would be."

The court was certainly not discussing the question whether a tax imposed by a state on a bank chartered by itself impaired the obligation of its contract; and these opinions are not conclusive as they would be had they been delivered in such a case; but they show that the question was not considered as doubtful, and that inferences, drawn from general expressions pointed to a different subject, cannot be correctly drawn.

We have reflected seriously on this case, and are of opinion that the act of the legislature of Rhode Island, passed in 1822, imposing a duty on licensed persons and others, and bodies corporate within the state, does not impair the obligation of the contract created by the charter granted to the plaintiffs in error. It is therefore the opinion of this court that there is no error in the judgment of the supreme judicial court for the state of Rhode Island, affirming the judgment of the circuit court in this case; and the same is affirmed; and the cause is remanded to the said supreme judicial court that its judgment may be finally entered.

Cherokee Nation

v.

Georgia.

NOTE.

THIS action was commenced by a bill in equity filed in the first instance in the Supreme Court by the Cherokee tribe of Indians praying that the Court restrain the State of Georgia, by injunction, from enforcing certain laws passed by it which, in effect, confiscated certain Indian territory and made the Indians subject to the laws of that State. The case was an attempt to settle, by an appeal to the Supreme Court, a political controversy long and bitterly fought between the Indians and their Georgia neighbors. The story of that controversy is written large in the history of the time.[1]

In 1802 the United States entered into an agreement with Georgia to extinguish the Indian title to lands in the State. (At that time the Indians held some twenty-six millions acres in the State.) In twenty years only two thirds of that land had been acquired. From 1817 on a wide-spread land speculation swept over Western Georgia; the question became a momentous one, and Georgia openly charged that the United States had failed to keep faith. In 1821 matters were investigated by Congress but

[1] An admirable note on the subject appears in John F. Dillon's *Complete Constitutional Decisions of John Marshall* (Callaghan, Chicago, 1903), p. 655. The facts are fully recorded in the histories of the period. McMasters, *History of the United States*, N. Y., 1901, vol. v., p. 175 *et seq.*, contains a full account and exhaustive reference to the original sources of knowledge.

an *impasse* had been reached; the Indians refused to cede more land. President Monroe defended the government's conduct and Georgia became more infuriated. In 1825 a treaty was negotiated with a few renegade chiefs of the Creeks, and confirmed, by which the tribe purported to cede all their land in Georgia. The Creeks executed the chiefs who had negotiated the treaty and a border war was imminent. In 1826 President Adams cancelled this treaty and made a new one for a much smaller cession. Georgia's policy of aggression went on and finally in 1827 a law was passed by both houses in Georgia extending the criminal jurisdiction of the State over all Indian lands within its borders, in direct violation and defiance of all the national treaties with the Indian tribes. Then all Cherokee laws were declared abrogated. The conduct of the missionaries dwelling among the Indians and siding with them was particularly heinous in the eyes of the State. After Jackson became President the attitude of the national government changed; he openly took the part of Georgia in 1829. Then, as a last resort, this action was brought before the Supreme Court by the Cherokee Nation.

The Supreme Court decided that it was without jurisdiction to entertain any bill brought by an Indian nation against a State, that an Indian nation was not a "foreign state" within the meaning of the second section of the third article of the Constitution giving to the Court jurisdiction of "controversies" "between a State, or the citizens thereof, and foreign States, citizens, or subjects." The decision defined, for all time, the legal status of the Indian tribes, giving to them semi-independent positions, as political societies in a state of pupilage or wardship toward the federal government,—but not foreign nations.

The opinion touches also on a second point, elaborated in the concurring opinion of Mr. Justice Johnson, that the relief sought, in the nature of a restraint on the governmental function of a State, was so far political as to be beyond the sphere of the judicial department—a theory of judicial conduct that, frequently as it is quoted, has come to weigh less strongly with the Supreme Court.

There can be no question of the soundness of Marshall's position. This case, with the later one of *Worcester* v. *Georgia*, *infra*, dealing with the same subject, has established the legal status of the relation of the government to the Indians which has never since been questioned.

The final chapter in the controversy between the Creeks and Cherokees and the State of Georgia is shown in the Worcester case *infra* and the note to that case.

Cherokee Nation

v.

State of Georgia.

[5 Peters, 1.]

1831.

William Wirt, Esq., and John Sergeant, Esq., appeared for the complainants. No counsel appeared for the State of Georgia.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This bill is brought by the Cherokee Nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation, which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their

lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant the present application is made.

Before we can look into the merits of the case a preliminary inquiry presents itself: Has this court jurisdiction of the cause?

The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state, or the citizens thereof, and foreign states, citizens, or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all
*16 *cases in which a state shall be a party. The party defendant may, then, unquestionably, be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people

capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains: Do the Cherokees constitute a foreign state in the sense of the constitution?

The counsel have shown conclusively that they are not a state of the union, and have insisted that, individually, they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term "foreign nation" is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

*17 * The Indian Territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories and laws,

it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees, in particular, were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take

effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants, and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connexion with them,

* 18 would * be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion that the framers of our constitution had not the Indian tribes in view when they opened the courts of the union to controversies between a state, or the citizens thereof, and foreign states.

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong had, perhaps, never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in

the courts of the union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such that we should feel much difficulty in considering them as designated by the term "foreign state," were there no other part in the constitution which might shed light on the meaning of these words. But we think that, in construing them, considerable aid is furnished by that clause, in the eighth section of the third article, which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In this clause they are as clearly contradistinguished, by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be, in fair construction, applied to them. The objects to which the power of regulating commerce might be directed are divided into three distinct classes,—foreign nations, the several states, and Indian tribes. When forming this article the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend that the words "In*dian tribes" were introduced into the article empowering congress to regulate commerce, for the purpose of removing those doubts

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in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the Confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations in the view of the convention, this exclusive power of regulating intercourse with them might have been, and, most probably, would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

It has been also said that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. "Foreign nations" is a general term, the application of which to Indian

tribes, when used in the American constitution, is, at best, extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term "foreign nations," not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that * construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

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The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighboring people asserting their independence; their right to which the state denies. On several of the matters alleged in the bill,

for example, on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

Lessor of Fisher

v.

Cockerell.

NOTE.

The course of legislation in Kentucky from 1819 to 1825, when that State was in a condition akin to general bankruptcy and the Legislature had inaugurated an elaborate system of relief laws that practically made it impossible to collect debts in the courts of that State, is noted in the introduction to these volumes. The firm stand which the Supreme Court then took in upholding the constitutional guarantee of the rights of individual contracts was one of the greatest services of Marshall and his court. The present case arose on just such a question, where the Legislature of Kentucky (though in this instance by an earlier law) had stepped in to deny a creditor his rights under the contract of separation of Virginia and Kentucky; but the record of the case, as it actually appeared, did not show that plaintiff's title in question did depend on that contract. On that preliminary question the court declined to take jurisdiction. The case is mainly notable in this connection for the dignity and firmness of the last paragraph of Marshall's opinion, where he answered the suggestions of State jealousy as to the constitutional powers of the Supreme Court.

The Lessor of Fisher

v.

William Cockerell.

[5 Peters. 248.]

1831.

Mr. Wickliffe for defendant in error moved to dismiss the appeal; Mr. Jones contra.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment of the court of appeals of Kentucky, affirming a judgment of the Union circuit court of that state.

The plaintiff brought an ejectment in the Union circuit court, against the defendant, and in June term, 1823, obtained judgment, on which a writ of *habere facias possessionem* was awarded. On the succeeding day it was ordered on the motion of the defendant, "that Josiah Williams and others be, and they are hereby appointed commissioners, who, or any five of whom, being first sworn, do, on the second Saturday of July next go on the lands from which the said defendant has been evicted in that action, and make assessment of what damage and

waste the said defendant has committed since the 20th of May, 1822, and the rent and profit accruing since the 17th of June, 1823, and of the value of improvements made on said land at the time of such assessment, regarding it as if such improvement had not been made; all which they shall separately and distinctly specify, and report to the next term of this court, until which time this motion is continued."

*253 *The report of the commissioners was made to the September term following, and was continued. On the 15th of March, 1824, it was, on the motion of the defendant, ordered to be recorded. The improvements were valued at one thousand three hundred and fifty dollars. John Fisher, the plaintiff in the ejectment and defendant on this motion, did not appear; and judgment was rendered against him for the sum reported to be due for improvements. Afterwards, to wit, on the 20th of the same month, the said Fisher appeared and tendered the following bill of exceptions, which was signed: "be it remembered, that in this case the defendant moved the court to quash the report of the commissioners appointed to value the improvements, assess the damages, &c., but the court refused to quash the same, to which opinion of the court the defendant excepts," &c. The said Fisher then appealed to the court of appeals.

A citation was issued by the clerk of the court of appeals, which was served. Among the errors assigned by the plaintiff in error was the following: "The plaintiff deriving title from Virginia,

the act or acts of the state of Kentucky on which this court has founded its opinion is repugnant as to the compact with Virginia; therefore void as to the case before the court, being against the constitution of the United States."

The cause was argued in the court of appeals in June, 1827, and the judgment of the circuit court was affirmed. That judgment is now brought before this court by a writ of error.

The seventh article of the compact between Virginia and Kentucky is in these words: "That all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state."

This is the article, the violation of which is alleged by the plaintiff in error. To bring his case within its protection, he must show that the title he asserts is derived from the laws of Virginia prior to the separation of the two states. If the title be not so derived, the compact does not extend to it; and the plaintiff alleges no other error.

The judgment in the ejectment is rendered on a general verdict, and the title of the plaintiff is not made a part of the * record by a bill of exceptions, or in any other manner. The clerk certifies that certain documents were read in evidence on the trial, and among these is the patent under which the plaintiff claimed. This patent was issued by the governor of Kentucky, and is founded

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on rights derived from the laws of Virginia. Can the court notice it? Can it be considered as part of the record?

In cases at common law, the course of the court has been uniform not to consider any paper as part of the record which is not made so by the pleadings, or by some opinion of the court referring to it. This rule is common to all courts exercising appellate jurisdiction, according to the course of the common law. The appellate court cannot know what evidence was given to the jury unless it be spread on the record in proper legal manner. The unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, cannot make that document or that evidence a part of the record so as to bring it to the cognizance of this court. We cannot perceive, then, from the record in the ejectment cause, that the plaintiff in error claimed under a title derived from the laws of Virginia.

The order made after the rendition of the judgment, directing commissioners to go on the land from which the defendants had been evicted and value the improvements, contains no allusion to the title under which the land was recovered.

The plaintiff in error might have resisted this order by showing that his title was derived from the laws of Virginia, and thus have spread his patent on the record. He has not done so.

On moving to quash the report of the commissioners, a fair occasion was again presented for making his patent the foundation of his motion, and

thus exhibiting a title derived from the laws of Virginia. He has not availed himself of it. He has made his motion in general terms, assigning no reason for it. The judgment of the court overruling the motion is also in general terms.

The record, then, of the Union circuit court does not show that the case is protected by the compact between Virginia and Kentucky. This court cannot know, judicially, that it was not a contest between two citizens, each claiming entirely under the laws of that state.

*255 *When the record of the Union circuit court was transferred to the court of appeals, the course of that court requires that the appellant, or the plaintiff in error, should assign the errors on which he means to rely. This assignment contains the first intimation that the title was derived from Virginia, and that the plaintiff in error relied on the compact between the two states.

But this assignment does not introduce the error into the record, or in any manner alter it. The court of appeals was not confined to the inquiry whether the error assigned was valid in point of law. The preliminary inquiry was whether it existed in the record. If upon examining the record that court could not discover that the plaintiff had asserted any right or interest in land derived from the laws of Virginia, the question whether the occupying claimants' law violated the compact between the states could not arise.

The twenty-fifth section of the act to establish the

judicial courts of the United States, which gives to this court the power of revising certain judgments of state courts, limits that power in these words: "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute."

If the view which has been taken of the record be correct, it does not show that the compact with Virginia was involved in the case. Consequently, the question whether the act for the benefit of occupying claimants was valid or not does not appear to have arisen, and nothing is shown on the record which can give jurisdiction to this court.

The counsel for the plaintiff in error has referred to former decisions of this court, laying down the general principle that the title under a treaty or law of the United States need not be specially pleaded; that it need not be stated on the record that a construction has been put on a treaty or law which this court may deem erroneous; or that an unconstitutional statute of a state has been held to be constitutional. It is sufficient if the record shows that such misconstruction must have taken place, or the decision could not have been made. *Harris* v. *Dennie*, 3 Peters, 292, is a * strong case to this effect. That case recognizes the principle on which the plaintiff in error relies, and says,

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"it is sufficient if from the facts stated such a question must have arisen, and the judgment of the state court would not have been what it is if there had not been a misconstruction from some act of Congress, &c., &c., &c.," but this misconstruction must appear from the facts stated, and those facts can be stated only on the record.

In the case of *Harris* v. *Dennie* a special verdict was found, and the court confined itself to a consideration of the facts stated in that verdict. Goods, in the custody of the United States until the duties should be secured and a permit granted for their being landed, were attached by a state officer at the suit of a private creditor. This fact was found in the special verdict, and the state court sustained the attachment. This court reviewed the act of congress for regulating the collection of duties on imports and tonnage, and came to the opinion "that the goods in the special verdict mentioned were not by the laws of the United States, under the circumstances mentioned in the said verdict, liable to be attached by the said Dennie under the process in the said suit mentioned; but that the said attachment so made by him, as aforesaid, was repugnant to the laws of the United States, and therefore utterly void." In this case no fact was noticed by the court which did not appear in the special verdict.

So in the case of *Craig et al* v. *The State of Missouri.* The parties in conformity with a law of that state dispensed with a jury and referred the facts as well as law to the court. The court, in its judg-

ment, stated the facts on which that judgment was founded. It appeared from this statement that the note on which the action was brought was given to secure the repayment of certain loan-office certificates, which a majority of the court deemed bills of credit in the sense of the constitution. This statement of facts made by the court of the state, in its judgment in a case in which the court was substituted for a jury, was thought equivalent to a special verdict. In this case, too, the court looked only at the record.

We say with confidence that this court has never taken jurisdiction unless the case as stated in the record was brought within the provisions of the twenty-fifth section of the judicial act. There are some cases in which the jurisdiction of * the court has been negatived that are entitled to notice. *Owings* v. *Norwood's Lessee*, 5 Cr., 344, was an ejectment brought in the general court of Maryland for a tract of land lying in Baltimore county. The defendant set up as a bar to the action an outstanding title in a British subject, which, he contended, was protected by the treaty of peace. Judgment was given for the plaintiff, and this judgment being affirmed in the court of appeals, was brought before this court. The judgment was affirmed; and the court said "whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states; and, whoever may have this right, it is to be protected; but if the party's title is not affected by the treaty, if *he* claims nothing

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under a treaty, his title cannot be affected by the treaty."

Upon the same principle the person who would claim the benefit of the compact between Virginia and Kentucky must show—and he can only show it on the record—that his case is within that compact.

The case of *Miller* v. *Nicholls*, 4 Wheat., 312, bears, we think, a strong resemblance to this. William Nicholls, collector, &c., being indebted to the United States, executed on the 9th of June, 1798, a mortgage to Henry Miller, for the use of the United States, for the sum of fifty-nine thousand four hundred and forty-four dollars, conditioned for the payment of twenty-nine thousand two hundred and seventy-one dollars. Process was issued on this mortgage from the supreme court of the state of Pennsylvania; in March, 1802, a *levari facias* was levied, the property sold, and the money, amounting to fourteen thousand five hundred and thirty dollars, brought into court and deposited with the prothonotary, subject to the order of the court.

On the 22d of December, 1797, the said Nicholls was found, on a settlement, indebted to the commonwealth of Pennsylvania in the sum of nine thousand nine hundred and eighty-seven dollars and fifteen cents, and judgment therefor was entered on the 6th of September, 1798. These facts were stated in a case agreed; and the following question was submitted to the court: "Whether the said settlement of the said public accounts of the said William Nicholls, as aforesaid, on the 22d of December, 1797,

was and is a lien from the date thereof, on the
*258 * real estate of the said William Nicholls, and which has since been sold as aforesaid."

On a rule made on the plaintiff in error to show cause why the amount of the debt due to the commonwealth should not be taken out of court, the attorney for the United States came into court and suggested "that the commonwealth of Pennsylvania ought not to be permitted to have and receive the money levied and produced by virtue of the execution in the suit, because the said attorney in behalf of the United States saith, that as well by virtue of the said execution, as of divers acts of congress, and particularly of an act of congress entitled 'an act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys,' approved the 3d of March, 1797, the said United States are entitled to have and receive the money aforesaid, and not the said commonwealth of Pennsylvania."

Judgment was rendered in favor of the state of Pennsylvania, which judgment was brought before this court by writ of error.

A motion was made to dismiss this writ of error, because the record did not show jurisdiction in the court under the twenty-fifth section of this judicial act. It was dismissed because the record did not show that an act of congress was applicable to the case. The court added, "the act of congress which is supposed to have been disregarded, and which probably was disregarded by the state court, is that

which gives the United States priority in cases of insolvency. Had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the court of Pennsylvania. But that fact does not appear."

In this case the suggestion filed by the attorney for the United States alleged in terms the priority claimed by the government under an act of congress which was specially referred to. But the case agreed had omitted to state a fact on which the application of that act depended. It had omitted to state that Nicholls was insolvent, and the priority of the United States attached in cases of insolvency only.

In this case the act of congress under which the United States claimed was stated in the record, and the claim under it was expressly made. But the fact which was required to * support the suggestion did not appear in the record. The court refused to take jurisdiction.

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In the case at bar, the fact that the title of the plaintiff in error was derived from the laws of Virginia (a fact without which the case cannot be brought within the compact) does not appear in the record; for we cannot consider a mere assignment of errors in an appellate court as a part of the record unless it be made so by a legislative act. The question whether the acts of Kentucky in favor of occupying claimants were or were not in contravention of the compact with Virginia, does not appear to have arisen; and, consequently, the case is not brought within the 25th section of the judicial act.

In the argument we have been admonished of the jealousy with which the states of the union view the revising power intrusted by the constitution and laws of the United States to this tribunal. To observations of this character the answer uniformly given has been that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it.

The writ of error is dismissed, the court having no jurisdiction

Worcester *v.* Georgia.

NOTE.

The long controversy in the first quarter of the nineteenth century between the State of Georgia and the Creeks and Cherokees living and holding lands within its borders by virtue of tribal treaties with the United States is briefly set out in the note to the case of *Cherokee Nation* v. *Georgia* at p. 309 *supra*.

After Georgia had extended its laws to include jurisdiction of all Indians within the State and to harass the Indians by every means in the form of law which ingenuity could devise,—in flagrant violation of the national treaties,—one of the first victims of that policy was Samuel A. Worcester, who was indicted under the Georgia laws for "residing within the limits of the Cherokee Nation without a license" and failing to take the oath to support the laws of Georgia. Worcester was a missionary, duly accredited by the American Board of Foreign Missions, in accordance with the national treaties, laboring among the Cherokees. These facts and the unconstitutionality of the Georgia statutes, he pleaded in bar of the indictment, but in spite of them he was convicted and sentenced to four years at hard labor. From the record of that conviction he appealed to the Supreme Court of the United States in the present case.

The opinion of the Court given by Marshall reviews with the greatest elaboration the history of the relations between the Indians and the colonies, and between the Indians and the United States, and finds that during the whole time the tribes of Indians "had always been considered as distinct, independent political communities, retaining their original natural rights, as

the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed." Further the Cherokee Indians were declared a separate community occupying its own territory in which the laws of Georgia were entirely void and without effect. The doctrines of the relations between the government and the Indian tribes laid down in this case and in *Cherokee Nation* v. *Georgia*, *supra* have never been questioned. (They were elaborately reviewed and reaffirmed in *United States* v. *Kagama*, 118 U. S., 375, and repeated in many other cases.) This doctrine was no more than the legal exposition of the executive policy previously adopted by the government toward the Indians, and any other decision would have hardly been possible to the most ardent exponent of the doctrine of States' rights.

But that is in the misleading light of modern experience. The decision was certainly not a popular one. Georgia's intemperate quarrel over the status of the Cherokees and Creeks and their valuable lands had made the question a political, not a legal one. Public sentiment did not support the opinion of the Court. Georgia paid no attention to the decision and Worcester remained at hard labor.[1] The central government made no attempt to carry out the Supreme Court decision. President Jackson is reputed to have said, "Mr. Marshall has made the decision, now let him execute it." The judgment of the Supreme Court simply did not decide the controversy and the Court could hardly have supposed it would.[2] Georgia was stronger than the Court. Yet it is typical of Marshall that there is not a hint of this in the opinion. Believing as he did that the Supreme Court had jurisdiction of the cause he decided it according to the strict letter of the Constitution. At the time the decision was rendered he was an old man of seventy-six. Clear-eyed as he was he could not see how the Union was to overcome the difficulties that beset it. Jackson was President, the tariff was vehemently

[1] Worcester was pardoned by the Governor of Georgia over a year later.

[2] The Indians were finally removed by treaty in 1837–8.

opposed, and the Southern doctrine of nullification was already bruited.

A more tactful, a less simple, or less great statesman would have avoided a controversy where the power of his court was to be put to the test and to fail, but Marshall, with evangelical austerity of mind, believing steadfastly and wholly in the truth as he saw it, feeling the upholding of the Constitution and the power of the central government as the one essential duty, made a decision that could not be carried out.

Samuel A. Worcester

v.

The State of Georgia.

[6 Peters, 515.]

1832.

Messrs. Sergeant, Wirt, and Chester appeared for plaintiff in error. There was no appearance for the State of Georgia.

OPINION.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This cause, in every point of view in which it can be placed, is of the deepest interest.

The defendant is a state, a member of the union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the state of Vermont, condemned to hard labor for four years in the penitentiary of Georgia, under color of an act which he alleges to be repugnant to the constitution, laws, and treaties of the United States.

The legislative power of a state, the controlling power of the constitution and laws of the United

States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.

It behoves this court, in every case, more especially in this, to examine into its jurisdiction with scrutinizing eyes, before it proceeds to the exercise of a power which is controverted.

The first step in the performance of this duty is the inquiry, whether the record is properly before the court.

It is certified by the clerk of the court which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned; and is also authenticated by the seal of the court. It is returned with, and annexed to, a writ of error issued in regular form, the citation being signed by one of the associate justices of the supreme court, and served on the governor and attorney general of the state more than thirty days before the comencemment of the term to which the writ of error was returnable.

The Judicial Act (sec. 22, 25, 2 Laws U. S., 64, 65), so far as it prescribes the mode of proceeding, appears to have been literally pursued.

In February, 1797, a rule (6 Wheat. Rules) was made on this subject in the following words: "It is ordered by the court that the clerk of the court, to which any writ of error shall be directed, may make return of the same by transmitting a true * copy of the record, and of all proceedings in the same, under his hand and the seal of the court."

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This has been done. But the signature of the judge

has not been added to that of the clerk. The law does not require it. The rule does not require it.

In the case of *Martin* v. *Hunter's Lessee* 1 Wheat., 304, 361, an exception was taken to the return of the refusal of the state court to enter a prior judgment of reversal by this court, because it was not made by the judge of the state court to which the writ was directed; but the exception was overruled, and the return was held sufficient. In *Buel* v. *Van Ness* 8 Wheat., 312, also a writ of error to a state court, the record was authenticated in the same manner. No exception was taken to it. These were civil cases. But it has been truly said at the bar that, in regard to this process, the law makes no distinction between a criminal and civil case. The same return is required in both. If the sanction of the court could be necessary for the establishment of this position, it has been silently given.

M'Culloch v. *The State of Maryland* (4 Wheat., 316) was a *qui tam* action brought to recover a penalty, and the record was authenticated by the seal of the court and the signature of the clerk, without that of a judge. *Brown et al.* v. *The State of Maryland* was an indictment for a fine and forfeiture. The record in this case, too, was authenticated by the seal of the court and the certificate of the clerk. The practice is both ways.

The record, then, according to the judicary act, and the rule and the practice of the court, is regularly before us. The more important inquiry is, Does it exhibit a case cognizable by this tribunal?

The indictment charges the plaintiff in error and others, being white persons, with the offense of "residing within the limits of the Cherokee nation without a license," and "without having taken the oath to support and defend the constitution and laws of the state of Georgia."

The defendant in the State court appeared in proper person, and filed the following plea:

"And the said Samuel A. Worcester, in his own proper person, comes and says that this court ought not to take *further cognizance of the action and prosecution aforesaid, because, he says, that on the 15th day of July, in the year 1831, he was, and still is, a resident in the Cherokee nation; and that the said supposed crime or crimes, and each of them, were committed if committed at all, at the town of New Echota, in the said Cherokee nation, out of the jurisdiction of this court, and not in the county of Gwinnet, or elsewhere, within the jurisdiction of this court. And this defendant saith that he is a citizen of the State of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee nation in the capacity of a duly authorised missionary of the American Board of Commissioners for Foreign Missions under the authority of the President of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the gospel to the Cherokee Indians, and in translating the sacred scriptures into their language, with the permission and approval of the said Cherokee nation,

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and in accordance with the humane policy of the government of the United States, for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment. And this defendant further saith that this prosecution the state of Georgia ought not to have or maintain, because he saith that several treaties have, from time to time, been entered into between the United States and the Cherokee nation of Indians, to wit, at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d day of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington City, on the 7th day of January, 1806; at Washington City on the 22d day of March, 1816; at the Chickasaw Council House, on the 14th day of September, 1816; at the Cherokee Agency, on the 8th day of July, 1817; and at Washington City, on the 27th day of February, 1819; all which treaties have been duly ratified by the senate of the United States of America; and by which treaties the United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing
*539 * the United States of America, in reference to acts done within their own territory; and by which

treaties the whole of the territory now occupied by the Cherokee nation, on the east of the Mississippi, has been solemnly guarantied to them; all of which treaties are existing treaties at this day, and in full force. By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several States composing the union of the United States; and it is thereby specially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a state, or from some one duly authorized thereto by the president of the United States; all of which will more fully and at large appear by reference to the aforesaid treaties. And this defendant saith that the several acts charged in the bill of indictment were done, or omitted to be done, if at all, within the said territory so recognized as belonging to the said nation, and so, as aforesaid, held by them under the guarantee of the United States; that for those acts the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said State; and that the laws of the state of Georgia, which profess to add the said territory to the several adjacent counties of the said state, and to extend the laws of Georgia over the said territory and persons inhabiting the same, and, in particular, the act on which this indictment against this defendant is grounded, to wit, an act entitled 'an act to prevent the exercise of assumed and arbitrary power, by all persons, under pretext of

authority from the Cherokee Indians, and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory,' are repugnant to the aforesaid treaties, which, according to the constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect; that the said laws of Georgia are also unconstitutional and void because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America, *as above re-
*540 cited: also, that the said laws of Georgia are unconstitutional and void because they interfere with and attempt to regulate and control the intercourse with the said Cherokee nation, which, by the said constitution, belongs exclusively to the congress of the United States; and because the said laws are repugnant to the statute of the United States, passed on the ——— day of March, 1802, entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers;' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offense or offenses alleged in the bill of indictment, or any of them; and, therefore, this defendant prays judgment

whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court. And the prisoner, being arraigned, plead not guilty. The jury found a verdict against him, and the court sentenced him to hard labor, in the penitentiary, for the term of four years.

By overruling this plea the court decided that the matter it contained was not a bar to the action. The plea, therefore, must be examined, for the purpose of determining whether it makes a case which brings the party within the provisions of the twenty-fifth section of the "act to establish the judicial courts of the United States."

The plea avers that the residence charged in the indictment was under the authority of the president of the United States, and with the permission and approval of the Cherokee nation; that the treaties subsisting between the United States and the Cherokees acknowledge their right, as a sovereign nation, to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America; that the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void; that the said act is also unconstitutional because it interferes with, and attempts to regulate and control, the intercourse with the Cherokee nation, which belongs exclusively to congress; and because, also, it is repugnant to the

statute of the United States entitled "an act to
*541 * regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

Let the averments of this plea be compared with the twenty-fifth section of the judicial act.

That section enumerates the cases in which the final judgment or decree of a state court may be revised in the supreme court of the United States. These are, "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission."

The indictment and plea in this case draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians; if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege, or exemption, specially set up and claimed under them." They

also draw into question the validity of a statute of the state of Georgia, "on the ground of its being repugnant to the constitution, treaties, and laws of the United States, and the decision is in favor of its validity."

It is, then, we think, too clear for controversy, that the act of congress by which this court is constituted has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them. We must examine the defense set up in this plea. We must inquire and decide whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws, and treaties of the United States.*

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It has been said at the bar that the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.

If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded.

It enacts that "all white persons, residing within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or

from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years."

The eleventh section authorizes the governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee nation, to raise and organize a guard, &c.

The thirteenth section enacts "that the said guard, or any member of them, shall be, and they are hereby, authorized and empowered to arrest any person legally charged with, or detected in, a violation of the laws of this state, and to convey, as soon as practicable, the person so arrested before a justice of the peace, judge of the superior, or justice of an inferior court of this state, to be dealt with according to law."

The extra-territorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction.

The first step, then, in the inquiry, which the constitution and laws impose on this court, is an examination of the rightfulness of this claim.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest

of the world, having institutions of their own, and governing themselves by their * own laws.
*543 It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in

our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European * governments, which title might be consummated by possession." (8 Wheat., 573.)

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This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil, and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a

discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political ; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them

to govern the people, or occupy the lands from *545 * sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.

The power of making war is conferred by these charters on the colonies, but *defensive* war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered, "for their several *defenses*, to encounter, expulse, repel, and resist, all persons who shall, without license," attempt to inhabit "within the said precincts and limits of the said several colonies, or that shall enterprise or attempt, at any time hereafter, the least detriment or annoyance of the said several colonies or plantations."

The charter to Connecticut concludes a general power to make defensive war with these terms: "And, upon *just causes*, to invade and destroy the natives or other enemies of the said colony."

The same power, in the same words, is conferred on the government of Rhode Island.

This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only on "just cause." The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war.

The charter to William Penn contains the following recital: "And because, in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves as of other enemies, pirates, and robbers, may probably be feared, therefore we have given," etc. The instrument then confers the power of war.

These barbarous nations, whose incursions were feared, and to repel whose incursions the power to make war was given, were surely not considered as the subjects of Penn or occupying his lands during his pleasure.

The same clause is introduced into the charter to Lord Baltimore.

*546 * The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, "at present waste and desolate." It recites: "And whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which in the late war, by the neighboring savages, was laid waste by fire and sword and great numbers of the English inhabitants miserably massacred; and our loving subjects who now inhabit there, by reason of the smallness of their numbers, will in case of any new war be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled and lieth open to the said savages."

These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and

all its inhabitants, from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not for conquest.

The charters contain passages showing one of their objects to be the civilization of the Indians and their conversion to Christianity—objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends. Instead of rousing their resentments, by asserting claims to their lands or to dominion over their persons, their alliance was sought by flattering professions and purchased by rich presents. The English, the French and the Spaniards were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of * words, nor supposing it to *547 be material whether they were called the

subjects or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain with regard to the Indians were detailed by Mr. Stuart, superintendent of Indian affairs, in a speech delivered at Mobile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says: "lastly, I inform you that it is the king's order to all his governors and subjects, to treat Indians with justice and humanity, and to forbear all

encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but, as you know, that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent, shall be present, and obtain the consent of all your people. The boundaries of your hunting grounds will be accurately fixed, and no settlement permitted to be made upon them. As you
*548 may be assured that all treaties * with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them."

The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the king), as aforesaid, are reserved to the said Indians, or any of them.

The proclamation proceeds: "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection and dominion, for the use of the said Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into

the sea from the west and northwest as aforesaid ; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

" And we do further strictly enjoin and require all persons whatever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands, which, not having been ceded to, or purchased by, us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

A proclamation issued by Governor Gage, in 1772, contains the following passage : " Whereas many persons, contrary to the positive orders of the king upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations ; particularly on the Ouabache." The proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans, such her claims, and such her practical exposition of the charters she had granted ; she considered them as nations capable of maintaining the relations of peace and war, of govern-

ing themselves, under her protection; and she
*549 * made treaties with them, the obligation of which she acknowledged.

This was the settled state of things when the war of our revolution commenced. The influence of our enemy was established; her resources enabled her to keep up that influence; and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies."

The early journals of congress exhibit the most anxious desire to conciliate the Indian nations. Three Indian departments were established, and commissioners appointed in each, "to treat with the Indians, in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend, and everything which might excite hostility was avoided.

The first treaty was made with the Delawares in September, 1778.

The language of equality in which it is drawn

evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States.

"1. That all offenses or acts of hostilities, by one or either of the contracting parties against the other, be mutually forgiven and buried in the depth of oblivion, never more to be had in remembrance.

"2. That a perpetual peace and friendship shall, from henceforth, take place and subsist between the contracting parties aforesaid, through all succeeding generations; and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other, in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation," etc.

3. The third article stipulates, among other things, a free *passage for the American troops through the Delaware nation; and engages that they shall be furnished with provisions and other necessaries at their value.

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"4. For the better security of the peace and friendship now entered into by the contracting parties against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders, by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs, and usages of the contracting parties, and natural justice," etc.

5. The fifth article regulates the trade between the contracting parties in a manner entirely equal.

6. The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States by their enemies, and from the imputation of which congress was then peculiarly anxious to free the government. It is in these words: "Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion that it is the design of the States aforesaid to extirpate the Indians, and take possession of their country; to obviate such false suggestion the United States do engage to guaranty to the aforesaid nation of Delawares, and their heirs, all their territorial rights, in the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware nation shall abide by and hold fast the chain of friendship now entered into."

The parties further agree that other tribes, friendly to the interests of the United States, may be invited to form a state, whereof the Delaware nation shall be the heads, and have a representation in congress.

This treaty, in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe.

The sixth article shows how congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.

*551 *During the war of the revolution the Cherokees took part with the British. After

its termination, the United States, though desirous of peace, did not feel its necessity so strongly as while the war continued. Their political situation being changed, they might very well think it advisable to assume a higher tone, and to impress on the Cherokees the same respect for congress which was before felt for the king of Great Britain. This may account for the language of the treaty of Hopewell. There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.

The treaty is introduced with the declaration that "the commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions."

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? We may ask, further, did the Cherokees come to the seat of the American government to solicit peace, or did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give," then, has no real importance attached to it.

The first and second articles stipulate for the mutual restoration of prisoners, and are, of course, equal.

The third article acknowledges the Cherokees to

be under the protection of the United States of America, and of no other power.

This stipulation is found in Indian treaties, generally. It was introduced into their treaties with Great Britain ; and may, probably, be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers ; and its true meaning is discerned in their relative situation.

The general law of European sovereigns respecting their claims in America limited the intercourse of Indians, in a * great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend

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and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is, undoubtedly, the sense in which it was made. Neither the British government, nor the Cherokees, ever understood it otherwise.

The same stipulation entered into with the United States is, undoubtedly, to be construed in the same manner. They receive the Cherokee nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government is explained by the language and acts of our first president.

The fourth article draws the boundary between the Indians and the citizens of the United States. But in describing this boundary, the term "allotted" and the term "hunting ground" are used.

Is it reasonable to suppose that the Indians, who could not write, and, most probably, could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out?" The actual subject of contract was the dividing line between the two nations,

*553 * and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it

may very well be supposed that they might not understand the term employed as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must, we think, be taken in the sense in which it was, most obviously, used.

So with respect to the words "hunting grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.

To the United States it could be a matter of no concern whether their whole territory was devoted to hunting grounds, or whether an occasional village and an occasional cornfield interrupted and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The fifth article withdraws the protection of the United States from any citizen who has settled, or shall settle, on the lands allotted to the Indians for their hunting grounds; and stipulates that, if he shall not remove within six months, the Indians may punish him.

The sixth and seventh articles stipulate for the

punishment of the citizens of either country who may commit offenses on or against the citizens of the other. The only inference to be drawn from them is that the United States considered the Cherokees as a nation.

The ninth article is in these words: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppression on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs* as they think proper."

To construe the expression, "managing all their affairs," * into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that congress should possess it. The commissioners brought forward the claim with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the

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terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

The treaty of Hopewell seems not to have established a solid peace. To accommodate the differences still existing between the state of Georgia and the Cherokee nation, the treaty of * Holston was
*555 negotiated in July, 1791. The existing constitution of the United States had been then adopted,

and the government, having more intrinsic capacity to enforce its just claims, was, perhaps, less mindful of high-sounding expressions, denoting superiority. We hear no more of giving peace to the Cherokees. The mutual desire of establishing permanent peace and friendship, and of removing all causes of war, is honestly avowed, and, in pursuance of this desire, the first article declares that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee nation.

The second article repeats the important acknowledgment that the Cherokee nation is under the protection of the United States of America, and of no other sovereign whosoever.

The meaning of this has been already explained. The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain.

This relation was that of a nation claiming and re-

ceiving the protection of one more powerful; not that of individuals abandoning their national character and submitting as subjects to the laws of a master.

The third article contains a perfectly equal stipulation for the surrender of prisoners.

The fourth article declares that "the boundary between the United States and the Cherokee nation shall be as follows: beginning," etc. We hear no more of "allotments" or of "hunting grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each, the ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed * that it shall be plainly marked by commissioners to be appointed by each party; and in order to extinguish forever all claim of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration the Cherokees release all right to the ceded land forever.

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By the fifth article the Cherokees allow the United States a road through their country, and the navigation of the Tennessee river. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.

By the sixth article it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is

itself an admission of their right to make or refuse it.

By the seventh article the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded.

The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport.

The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.

This treaty, thus explicitly recognizing the national character of the Cherokees and their right of self-government, thus guarantying their lands, assuming the duty of protection, and, of course, pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our Government Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest* a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider

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the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.

In 1819 congress passed an act promoting those humane designs of civilizing the neighboring Indians which had long been cherished by the executive. It enacts "that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the president of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced *with their own consent*, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation, and for teaching their children in reading, writing and arithmetic, and for performing such other duties as may be enjoined, according to such instructions and rules as the president may give and prescribe for the regulation of their conduct in the discharge of their duties."

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it

cannot be doubted that the general words of the act comprehend them. Their advance in "the habits and arts of civilization" rather encouraged perseverance in the laudable exertions still further to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.

*558 * Is this the rightful exercise of power, or is it usurpation?

While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all; congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connection with the mother country, and declared

these United Colonies to be independent states. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, congress assumed the management of Indian affairs; first in the name of these United Colonies; and afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the states, respectively, unless a state be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted." This instrument also gave the United States in congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians,
*559 not * members of any of the states; provided that the legislative power of any

state within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the states of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims produced representations to congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two states, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes.* These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power in the confederation are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a re-

striction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We * have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

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Georgia herself has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister states, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States with their consent; that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line established by treaties; that within their boundary they possessed rights with which no state could interfere; and that the

whole power of regulating the intercourse with them was vested in the United States. A review of these acts on the part of Georgia would occupy too much time, and is the less necessary because they have been accurately detailed in the argument at the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed; is placed the charters granted by the monarch of a distant and distinct region, parceling out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain at the treaty of peace could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles, so often repeated in Indian treaties, extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled * doctrine of the law of nations is, that a weaker power does not surrender its independence, its right to self-government, by associating with a stronger, and tak-

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ing its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of self-government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guaranty and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation is by our constitution and laws vested in the government of the United States.

The act of the state of Georgia under which the plaintiff in error was prosecuted is consequently void and the judgment a nullity. Can this court revise and reverse it?

If the objection to the system of legislation lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete so far

as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, is committed exclusively to the government of the union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates *the Cherokee country from Georgia, guaranty to them all the land within their boundary, solemnly pledge the faith of the United States to restrain their citizens from trespassing on it, and recognize the pre-existing power of the nation to govern itself.

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They are in equal hostility with the acts of congress for regulating this intercourse and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission and by authority of the president of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will those powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away while under guardianship of treaties guarantying the country in which he resided

and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the union, those duties which the humane policy adopted by congress had recommended. He was apprehended, tried and condemned under color of a law which has been shown to be repugnant to the constitution, laws and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws and treaties of his country.

This point has been elaborately argued, and, after deliberate consideration, decided, in the case of *Cohens* v. *The Commonwealth of Virginia* (6 Wheat., 264).

It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester to hard labor in the penitentiary of the state of Georgia for four years, was pronounced by that court under color of a law which is void, as being repugnant to the constitution, treaties, and laws of the
*563 * United States, and ought, therefore, to be reversed and annulled.

Barron *v.* Baltimore.

NOTE.

This case arose from an action brought by one Barron against the city of Baltimore to recover damages to certain wharf property caused by embankments and harbor improvements made by the city under authority of the State of Maryland. The damage was alleged to amount to the confiscation of the plaintiff's property without compensation, and the plaintiff's contention was that the fifth amendment to the Constitution was a restriction on State as well as national power. The opinion is clear and undoubted law;—it was and is a fact of history beyond discussion that the first eleven amendments to the federal Constitution were a bill of rights of the States intended to secure to them a greater measure of sovereignty and to limit the federal power; and it is alike clear that the adoption of the Constitution by some of the States was conditioned on the adoption of these amendments. To have held these amendments applicable to the States would have been a clear usurpation of power by the central government. It is worthy of note that the three amendments of the Constitution adopted after the Rebellion did impose restrictions on the States and that among those restrictions were the more important of the restrictions laid on the central government by the first eleven amendments; but that was the work of seventy years of Constitutional government and a Rebellion, it was never intended by the constitution as adopted, nor desired or advocated by the people of Marshall's time or any one of their leaders.

Barron

v.

The Mayor and City Council of Baltimore.

[7 Peters, 243.]

1833.

Mr. Mayer for plaintiff in error ; Messrs. Taney and Scott, contra.

Mr. Chief Justice MARSHALL delivered the opinion of the Court :

The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section of the judicial act.

The plaintiff in error contends that it comes within that clause in the fifth amendment to the constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective
*248 *governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the constitution was intended to secure the people of the several states against the undue exercise of power by

their respective state governments, as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or *ex post facto* law shall be passed." No language can be more general; yet the demonstration is complete, that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares that "no state shall pass any bill of attainder or *ex post facto* law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to

operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states. "No state shall enter into any treaty," &c. Perceiving that, in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on * the people would apply to the state government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the states.

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It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest.

A state is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power which is conferred entirely on the general government, if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution. To grant letters of marque and reprisal would lead directly to war, the power of declaring which is expressly given to congress. To coin money is also the exercise of a power conferred on congress. It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects intrusted to the government of the union, in which the citizens of all the states are interested. In these alone were the whole people concerned.

The question of their application to states is not left to construction. It is averred in positive words.

If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government and on those of the states ; if, in every inhibition intended to act on state power, words are employed which directly express that intent, some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several states, or any of them, required changes in their constitutions ; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A * convention would have been assembled by the discontented state, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that

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intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers, which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the fifth

amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the * government of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause in the court of that state, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

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APPENDIX A.

For the sake of completeness, there are included in these volumes the six following opinions of Marshall, dealing with constitutional law, delivered while sitting as a Circuit Judge in Virginia (during the time that he was Chief Justice). Save the case of the *Brig Wilson*, no one of them is of first importance.

Meade *v.* Deputy Marshal.

NOTE.

This case, like all the succeeding cases in this volume, was heard by Marshall, sitting as a Circuit Judge on circuit in Virginia. The case arose on a motion for the discharge of the petitioner on a writ of *habeas corpus* to obtain release from imprisonment caused by failure to pay a fine imposed for failure to enter the militia service. The objection was taken that the court imposing this fine was a state court and not a United States court, and it was argued that the constitutional power of Congress "to provide for calling forth the militia to execute the laws of the Union," was exclusive and left no power in the states to establish courts martial to carry out the government commands to the militia. The inconveniences of this doctrine are manifest, but, in his opinion Marshall clearly intimated that it was correct. In *Houston* v. *Moore*, 5 Wheaton, 1, in 1820, this doctrine was substantially set aside by the Supreme Court in an able opinion by Justice Johnson (Story dissenting), and can no longer be considered as representing the law. The precise question of the case is of no substantial importance and it has been practically forgotten.

William Meade

v.

The Deputy Marshal of the Virginia District.

[1 Brockenbrough's Reports, 324.]

Before Hon. John Marshall, Chief Justice of the United States.

November Term, 1815.

MOTION to be discharged under a writ of *habeas corpus*. The motion was made, and the following opinion delivered in vacation.

*325 * MARSHALL, C. J.—By the return of the deputy marshal, it appears, that William Meade, the petitioner, was taken into custody by him, and is detained in custody, on account of the non-payment of a fine of forty-eight dollars, assessed upon him by the sentence of a court martial, for failing to take the field, in pursuance of general orders of the 24th of March, 1813, the marshal not having found property, whereof the said fine might have been made. The court martial was convened by the following order:

"*November 8th, 1813.*

"*Brigade Orders.*

"A general court martial, to consist of Lieutenant Colonel Mason, president, &c., will convene at the court house, in Leesburg, on Friday, the third day of next month, for the trial of delinquencies, which occurred under the late requisitions of the governor of Virginia, and secretary of war, for militia from the county of Loudoun.

(Signed) "HUGH DOUGLASS,

"*Brigadier General, Sixth Brigade of Va. Militia.*"

The court being convened, the following proceedings were had.

"It appearing to the satisfaction of the court, that the following persons of the county of Loudoun, were regularly detailed for militia duty, and were required to take the field, under general orders, of March 24th, 1813, but refused, or failed to comply therewith; whereupon, this court doth order and adjudge, that they be, each, severally fined the sum annexed to their names, as follows, to wit: William Meade, forty-eight dollars," &c.

On the part of the petitioner, the obligation of this sentence is denied.

1st. Because it is a court, sitting under the authority of the state, and not of the United States.

2dly. It has not proceeded according to the laws of the State, nor is it constituted according to those laws.

*326 *3dly. Because the court proceeded without notice.

1st. The court was unquestionably convened by the authority of the state, and sat as a state court. It is, however, contended, that the marshal may collect fines, assessed by a state court, for the failure of a militia-man to take the field, in pursuance of the orders of the President of the United States.

The Constitution of the United States, gives power to congress, "to provide for calling forth the militia to execute the laws of the Union," &c.

In the execution of this power, it is not doubted, that congress may provide the means of punishing those who shall fail to obey the requisitions, made in pursuance of the laws of the Union, and may prescribe the mode of proceeding against such delinquents, and the tribunal before which such proceedings should be had. Indeed, it would seem reasonable to expect, that all the proceedings against delinquents, should rest on the authority of that power, which had been offended by the delinquency.

This idea must be retained, whilst considering the acts of congress. The first section of the act of 1795, authorizes the president, "whenever the United States shall be invaded, or be

in imminent danger of invasion," &c., "to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary, to repel such invasion, and to issue his orders for that purpose, to such officer, or officers of the militia, as he shall think proper."

The fifth section enacts, "That every officer, non-commissioned officer, or private of the militia, who shall fail to obey the order of the President of the United States, in any of the cases before recited, shall forfeit the sum, not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial."

The sixth section enacts, "That courts martial, for the trial of militia, shall be composed of militia officers only."[1]

*327 *Upon these sections, depends the question, whether courts martial for the assessment of fines against delinquent militia-men, should be constituted under the authority of the United States, or of the state to which the delinquent belongs. The idea originally suggested, that the tribunal for the trial of the offence, should be constituted by, or derive its authority from, the government against which the offence had been committed, would seem to require, that the court thus referred to in general terms, should be a court sitting under the authority of the United States. It would be reasonable to expect, if the power were to be devolved on the court of a state government, that more explicit terms would be used for conveying it. And it seems, also, to be a reasonable construction, that the legislature, when in the sixth section, providing a court martial for the trial of militia, held in mind the offences described in the preceding section, and to be submitted to a court martial. If the offences described in the fifth section, are to be tried by a court, constituted according to the provisions of the sixth section, then we should be led by the language of that section, to suppose, that congress had in contemplation a court formed of officers in actual service, since the provision that it should be composed "of militia officers only," would otherwise be nugatory.

[1] Act of February 28, 1795.

This construction derives some aid from the act of 1814. By that act, courts martial for the trial of offences, such as that with which Mr. Meade is charged, are to be appointed according to the rules prescribed by the articles of war. The court in the present case, is not appointed according to those rules.[1]

The only argument which occurs to me against this reasoning, grows out of the inconvenience arising from trying delinquent militia-men, who remain at home, by a court martial, composed of officers in actual service.

This inconvenience may be great, and well deserves the consideration of congress; but I doubt whether it is sufficient to *328 * justify a judge, in so construing a law, as to devolve on courts, sitting under the authority of the state, a power which, in its nature, belongs to the United States.

If, however, this should be the proper construction, then the court must be constituted according to the laws of the state.

On examining the laws of Virginia, it appears, that no court martial can be called for the assessment of fines, or for the trial of privates, not in actual service. This duty is performed by courts of inquiry, and a second court must sit to receive the excuses of those against whom a previous court may have assessed fines, before the sentence becomes final, or can be executed.

If it be supposed, that the act of congress has conferred the jurisdiction against delinquent militia privates on courts martial, constituted as those are for the trial of officers, still this court has proceeded in such a manner, that its sentence cannot be sustained.

It is a principle of natural justice, which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard, or without an opportunity of being heard. There is no law authorizing courts martial to proceed against any person, without notice. Consequently, such proceeding is entirely unlawful. In the case of the courts of inquiry, sitting under the authority of the state, the practice has, I believe, prevailed, to proceed in the first instance, without notice; but this inconvenience is, in some degree reme-

[1] Additional act of April 18th, 1814.

died, by a second court, and I am by no means prepared for such a construction of the act, as would justify rendering the sentence final, without substantial notice. But, be this as it may, this is a court martial, not a court of inquiry, and no law exists, authorizing a court martial to proceed without notice, as in this case, the court appears to have proceeded. For these reasons, I consider its sentences as entirely nugatory, and do, therefore, direct the petitioner to be discharged from the custody of the marshal.

Prentiss, Trustee

v.

Barton's Executors.

NOTE.

The point of this case heard by Marshall on circuit, in Virginia, was an extremely simple one. An action was brought in the federal court, by one alleging himself a citizen of Maryland against one whom he alleged a citizen of Virginia. The jurisdiction of the court depended on this diversity of citizenship. The defendant alleged that plaintiff was a citizen of the District of Columbia or of Virginia. That fact was important, because if he were a citizen of the District, under the doctrine of *Hepburn & Dundas* v. *Ellzey*, 2 Cranch, 445 (and *supra*, Vol. I., p. 62) he could not sue in the federal courts, and if he were a citizen of Virginia there would not be the requisite diversity of citizenship to give the court jurisdiction.

In these circumstances Marshall laid down, with undoubted correctness, the meaning of "citizen" as used in the Constitution, and particularly in the clauses relating to the jurisdiction of the courts.

Prentiss, Trustee of Prentiss

v.

Barton's Executors.

[Brockenbrough's Reports, 389.]

Before Hon. John Marshall, Chief Justice of the United States.

November Term, 1819.

Marshall, C. J.—The jurisdiction of the Court in this case depends on the citizenship of the plaintiff. If he was a citizen of the District of Columbia, or of the commonwealth of Virginia, this suit cannot be maintained ; if he was a citizen of any other state, he may sue in this Court.

Before I proceed to examine the facts in this case, I will consider the principle which must govern it.

The Constitution of the United States gives the courts of the Union jurisdiction over controversies arising " between citizens of different states," [Art. III. Sect. II. 1.] and the judicial act gives this Court jurisdiction, " where the suit is between a citizen of the state where the suit is brought, and a citizen of another state."

The Constitution, as well as the law, clearly contemplates a
* 391 * distinction between citizens of different states ; and although the 4th article declares, that " the citizens of each state, shall be entitled to all privileges, and immunities of citizens in the several states," yet they cannot be, in the sense of the judicial article, or of the judicial act, citizens of the several states. There is still a distinction between them, if in no other respect, in their right to

sue in the courts of the Union. This distinction although it may be clear enough in theory, cannot always be easily drawn in fact. In a government, composed like ours, of distinct governments, and containing the principle which has been stated, it cannot depend entirely on birth. A citizen living in a state, with all the privileges and immunities of a citizen of that state, ought to share its burthens also, and will be considered, to every purpose, as a citizen. Accordingly, the universal understanding and practice of America is, that a citizen of the United States, residing permanently in any state, is a citizen of that state. Otherwise, a citizen by statute could never belong to any state, and could never maintain a suit in the courts of the United States. In the sense of the Constitution and of the judicial act, he who is incorporated into the body of the state, by permanent residence therein, so as to become a member of it, must be a citizen of that state, although born in another. Or, to use the phrase more familiar in the books, a citizen of the United States must be a citizen of that state in which his domicil is placed. What is permanent residence? This question must, in some cases, depend on a great variety of considerations; and as in all mixed and doubtful questions of fact, each circumstance must be allowed its due weight. Birth alone, undoubtedly, gives a man permanent rights as a citizen; and although those rights, so far as respects suits in the courts of the United States, may be changed by a change of residence, yet, in doubtful cases, birth will always have great influence.

This question has never come directly, so far as I can discover, before the Supreme Court of the United States. The cases rather prove, that the jurisdiction of the court must be shown, than determine what constitutes citizenship.

*392 *The first is that of *Bingham* v. *Cabot et al.*, [3 Dallas, 382,] which was decided in 1798. The declaration was in the name of John Cabot of Beverly, in the district of Massachusetts, merchant, and in the name of other plaintiffs, described in the same manner. The court were clearly of opinion, that it was necessary to set forth the citizenship, or alienage of

the respective parties, in order to bring the case within the jurisdiction of the circuit court.

In the argument the attorney-general observed, "a citizen of one state, may reside for a term of years, in another state, of which he is not a citizen, for citizenship is clearly not co-extensive with inhabitancy."

Mr. Dexter, in support of the jurisdiction, contended, that citizenship in a particular state, may be changed without going through the forms and solemnities, required in case of an alien; that on the principles of the Constitution, a citizen of the United States is to be considered, more particularly as a citizen of that state, in which he has his family, is a permanent inhabitant, and is, in short, domiciliated.

This question came on again, in 1803, in the case of *Abercrombie* v. *Dupuis & Another*. [1 Cranch, 343.] The suit was brought in the district of Georgia, and the plaintiffs averred, "that they do severally reside without the limits of the district of Georgia aforesaid, viz.: in the state of Kentucky, therefore, they have a right to commence their said action," &c. The judgment was reversed on the authority of the case of *Bingham* v. *Cabot et al.*

The question came on again in, 1804 in the case of *Wood* v. *Wagnon*, [2 Cranch, 9,] also from the district of Georgia. The declaration in that case, stated the plaintiff to be a citizen of Pennsylvania, and the defendant to be "of Georgia." The judgment in this case was also reversed.

These cases all show that the jurisdiction of the court must appear on the record; but the last shows, that jurisdiction is not given, by averring a party to be of a particular state. The plaintiff was a citizen of Pennsylvania, and had, consequently, a

*393 * right to sue either an alien or a citizen of Georgia, in the circuit court of Georgia. The defendant must have been, either an alien, or a citizen. If an alien, the court had jurisdiction. The judgment, then, must have been reversed, because the defendant might be "of Georgia," and yet a citizen of another state. This, certainly, does not prove what residence will constitute domicil, or citizenship; but I think it does prove, that it is not constituted by every residence.

By the general laws of the civilized world, the domicil of the parents at the time of birth, or what is termed the domicil of origin, constitutes the domicil of an infant, and continues, until abandoned, or until the acquisition of a new domicil, in a different place. As it gives political rights, which are not lost by a mere change of domicil, it is recovered by any manifestation of a disposition to resume the native character; perhaps, by a surrender of a new domicil. In fact, it may be considered rather as suspended, than annihilated.

All agree, that a new residence is not acquired, by a residence for temporary purposes. It must be a permanent residence. Vattel defines it to be, "a habitation, fixed in any place, with an intention of always staying there." The existence of this intention, must be manifested by overt acts, in explanation of which, if doubtful, the declarations of the party will, undoubtedly, be received.

Let this rule be applied to the case at bar. Christopher Prentiss was born in Massachusetts, of which state his parents were citizens, and there he received his education, and married a wife.

*394 * He appears to have continued to reside in Massachusetts until the year 1801, when he came to Georgetown, in the District of Columbia, and joined Mr. Rind in editing a paper published in that place. In 1802, he sold his interest in that paper to Mr. Caldwell, and removed to Baltimore, with his family, where he continued for some time, as the editor of a paper. In 1803, he returned to Massachusetts, and leaving his wife with her father went himself to England. After his return in 1804, he was frequently in the District of Columbia, where he was employed to take the debates of congress for a printer in Philadelphia.

I think, there is not much difficulty in determining, that Mr. Prentiss was not a citizen of the District of Columbia. If he acquired a domicil in that place in 1801, he certainly abandoned it in 1802, when he sold his property, and removed with his family to Baltimore. Whatever might have been his character, when residing in Baltimore with his family, he certainly recovered his original domicil, when he returned with his family to Massa-

chusetts, and there is no ground to believe, that his afterwards residing in the District of Columbia, for the purpose of taking the debates, was an abandonment of it.

It remains to inquire whether, at the emanation of this writ, he was a citizen of Virginia?

It appears, that he came to Richmond, in March 1805, and engaged, generally, with Mr. Davis, as the editor of his paper. On the 18th of July, he returned to Massachusetts, where he continued, until the latter end of September, when he came to Virginia, and resumed his employment with Mr. Davis. About the last of November, in the same year, he left Mr. Davis, finally, and has since been, occasionally, in Massachusetts, where his family resides, and, occasionally, in other states.

I cannot think this residence in Richmond, was "a habitancy, with an intention of staying here always." It continued for only a few months, a considerable part of which was passed in his native state, and his employment was one, which he could abandon at any time. Had he acquired any property in the paper, the case would have been more doubtful, or had he re-

*395 * mained in Richmond, till this time, or until this question occurred, his residence would have assumed the appearance of permanence.

Plea to the jurisdiction overruled.[1]

[1] "The Chief Justice, at the conclusion of the above opinion, referred to the case of *The Nereide*, [9 Cranch, 388; 3 Con. Rep. Sup. Ct. U. S., 439.] That case was decided at February Term, 1815, and the Chief Justice delivered the opinion of the court. Among other points resolved in that case, it was decided, that a merchant, being a native of, and having a fixed residence, in Buenos Ayres, where he carried on business, did not acquire a foreign commercial character, by occasional visits to a foreign country."—Brockenbrough's Note.

Case of the Brig Wilson.

NOTE.

THIS case was decided by Marshall sitting on circuit, in Virginia in 1820, as an appellate court from the district court of Norfolk, and is a case of real importance dealing with the construction of the commerce clause. The case is considered at length in the introduction to these volumes.

The facts of the case, which do not appear clearly in the opinion are substantially as follows: The brig *Wilson* was libelled and her cargo of brandy, gin, etc., claimed forfeit for violating an act of Congress as to import duties, and by virtue of an act of Congress authorizing forfeiture of any vessel engaged in bringing persons of color from a foreign port into a state, which by its local laws (as Virginia did,) forbade negro importation. By the terms of the Constitution, Congress had no power at the time this act was passed to prohibit the importation of slaves, and the question substantially was whether the commerce clause gave it a sufficiently broad power to accomplish the same result in this roundabout way.

In the court below a decree was given for the libellant, allowing the forfeiture and it was from that decree that the appeal was taken. Only so much of the opinion as deals with the fifth count of the libel is in regard to the constitutional point.

The Brig Wilson (Ivory Huntress, Claimant,)

v.

The United States.

[1 Brockenbrough's Reports, 423.]

Before Hon. John Marshall, Chief Justice of the United States.

May Term, 1820.

THE following opinion was delivered by

MARSHALL, C. J.—The four first counts of this case, present for the consideration of the Court, a general question of considerable importance. It is this: Does the act, "to regulate the collection of duties on imports and tonnage," apply to privateers, not engaged in the importation of goods?

*429 *The 31st section enacts, "that it shall not be necessary for the master, or person having the command of any ship or vessel of war, &c., to make such report and entry as aforesaid."

If the words "ship or vessel of war," be construed to comprehend a privateer, there is an end of this part of the case, because, if no report or entry is required, it cannot be pretended, that any of the provisions of the act extend to a privateer, demeaning herself in her military character, and not performing the office of a merchant vessel.

The counsel for the appellant has certainly urged many reasons, which have great weight in favour of the construction for which he contends. The term, "ship or vessel of war," has been considered, and, I think, properly considered, as a generic

term, including both national ships, and private armed ships. When it is used generally, it comprehends both, unless the context, or the subject matter, should exclude the one or the other. The authorities cited at the bar, show, that courts and writers on public law, have used the term in this general sense.

If either the language, or the objects of this law, be consulted, I think they strengthen this natural and comprehensive construction of these words.

The object of the law, is professedly and obviously to raise a revenue from commerce and consumption, not to regulate the conduct of the ships of war, whether public or private, of foreign nations. All the regulations are obviously calculated for merchant vessels, and not one calculated for privateers, who might come into our ports, although a totally distinct provision for them, would certainly be necessary.

The language of the law, applies it to vessels destined for the United States, not to vessels destined for a cruize on the high seas. The form of the manifest requires, that the importer should state, to what port the vessel is bound and, to whom the goods are consigned: regulations not adapted to goods captured at sea, by a cruizer.

If this act applies to privateers, the tonnage duty would be demandable. But it cannot be supposed, that this duty is im-
*430 * posed on privateers, employed in cruizing, and not in the conveyance of merchandise.

It is also an argument, which deserves consideration, that the policy of the United States has been unfriendly to the sale, in our ports, of prizes made by foreign privateers, on nations with whom we are at peace. Some of our treaties contain express stipulations against it; and the course of the government has been, to prohibit the practice, even where no specific engagements bind us to do so. Were the revenue laws, applicable to privateers, and to their prizes and prize goods, they would give a right to introduce those goods in opposition to the avowed and uniform policy of the government. The doctrine, that the validity of prizes could not be adjudged in our ports, would be of little importance, if they could be brought in and sold.

I think, then, that our revenue laws do not apply to privateers, unless they take up the character of merchant-men, by attempting to import goods. When they do so, they attempt, under the garb of their military character, to conceal real commercial transactions. This would be fraud on the revenue laws, which no nation will or ought to tolerate. The privateer, which acts as a merchant vessel, must be treated and considered as a merchant vessel.

In this case, there is no evidence, that any goods were landed, or that more were brought in, than were intended to be carried out. The only evidence, which I think at all important, is that of the pilot. His testimony, certainly, excited suspicion. Opposed to it, however, is the testimony of the witnesses belonging to the vessel, who say, that the spirits were designed for the crew, to be used as stores.

I proceed, now, to the fifth count in the libel.

The first question which will be considered in this part of the case, will be the constitutionality of the act of congress, under which this condemnation has been made.

It will readily be admitted, that the power of the legislature of the Union, on this subject, is derived entirely from the 3d clause of the 8th section of the 1st article of the Constitution.

*431 * That clause enables congress, "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."

What is the extent of this power to regulate commerce? Does it not comprehend the navigation of the country? May not the vessels, as well as the articles they bring, be regulated? Upon what principle is it, that the ships of any foreign nation have been forbidden, under pain of forfeiture, to enter our ports? The authority to make such laws has never been questioned; and yet, it can be sustained by no other clause in the Constitution, than that which enables congress to regulate commerce. If this power over vessels is not in congress, where does it reside? Certainly it is not annihilated; and if not, it must reside somewhere. Does it reside in the states? No American politician has ever been so extravagant as to contend for this. No man has been wild enough to maintain, that, although the

power to regulate commerce, gives congress an unlimited power over the cargoes, it does not enable that body to control the vehicle in which they are imported : that, while the whole power of commerce is vested in congress, the state legislatures may confiscate every vessel which enters their ports, and congress is unable to prevent their entry. Let it be admitted, for the sake of argument, that a law, forbidding a free man of any colour, to come into the United States, would be void, and that no penalty, imposed on him by Congress, could be enforced : still, the vessel, which should bring him into the United States, might be forfeited, and that forfeiture enforced ; since even an empty vessel, or a packet, employed solely in the conveyance of passengers and letters, may be regulated and forfeited. There is not in the Constitution, one syllable on the subject of navigation. And yet, every power that pertains to navigation has been uniformly exercised, and, in the opinion of all, been rightfully exercised, by congress. From the adoption of the Constitution, till this time, the universal sense of of America has been, that the word commerce, as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a *control over navigation is necessarily incidental to the power to regulate commerce.

*432

I could feel no difficulty in saying, that the power to regulate commerce, clearly comprehended the case, were there no other clauses in the Constitution, showing the sense of the convention on that subject. But there is a clause which would remove the doubt, if any could exist.

The first clause of the ninth section, declares, that "the migration, or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by the congress, prior to the year 1808." This has been truly said to be a limitation of the power of congress to regulate commerce, and it will not be pretended, that a limitation of a power is to be construed into a grant of power. But, though such a limitation be not a grant, it is certainly evidence of the extent which those who made both the grant and limitation, attributed to the grant. The framers of our Constitution could never have declared, that a given power should not, for a limited

time, be exercised on a particular object, if, in their opinion, it could never be exercised on that object.

Suppose the grant and the limitation be brought together, the clause would read thus: "Congress shall have power to regulate commerce, &c., but this power shall not be so exercised, as to prohibit the migration, or importation of such persons, as any of the states now existing, may think proper to admit, prior to the year 1808." Would it be possible to doubt, that the power to regulate commerce, in the sense in which those words were used in the Constitution, included the power to prohibit the migration, or importation, of any persons whatever, into the states, except so far as this power might be restrained by other clauses of the Constitution? I think it would be impossible. It appears to me, then, that the power of congress over vessels, which might bring in persons of any description, whatever, was complete before the year 1808, except that it could not be so exercised, as to prohibit the importation or migration of any persons, whom any state, in existence at the formation of the

*433 * Constitution, might think proper to admit. The act of congress, then, is to be construed with a view to this restriction, on the power of the legislature; and the only question will be, whether it comprehends this case?

The case is, that the brig *Wilson*, a private armed cruizer, commissioned by the government of Buenos Ayres, came into Norfolk, navigated by a crew some of whom were people of colour. They were however, all free men, and all of them sailors, composing a part of the crew. While in port some of them were discharged, and came on shore.

The libel charges that three persons of colour were landed from the vessel, whose admission or importation was prohibited by the laws of Virginia, contrary to the act of congress, by which the vessel was forfeited.

Is this case within the act of congress, passed the 28th of February 1803?[1]

[1] [*An act to prevent the importation of certain persons into certain states where, by the laws thereof, their admission is prohibited.*

SECT. 1. *Be it enacted*, That from and after the first of April next, no

*434 *The first section, which is the prohibiting part of the act, is in these words: "From and after the first day of April next, no master or captain of any ship or vessel, or any other persons, shall import or bring, or cause to be imported

master or captain of any ship or vessel, or any other person, shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman, of the United States, or seamen, natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state, which, by law, has prohibited, or shall prohibit, the admission, or importation of such negro, mulatto, or other person of colour. And if any captain, or master aforesaid, or any other person, shall import or bring, or cause to be imported or brought, into any of the ports or places aforesaid, any of the persons whose admission or importation, is prohibited, as aforesaid, he shall forfeit and pay the sum of one thousand dollars for each, and every negro, mulatto, or other person of colour aforesaid, brought or imported as aforesaid; to be sued for and recovered by action of debt, in any court of the United States; one half thereof to the use of the United States, the other half, to any person or persons prosecuting for the penalty: and in any action instituted for the recovery of the penalty aforesaid, the person or persons sued, may be held to special bail: *Provided always*, That nothing contained in this act, shall be construed to prohibit the admission of Indians.

SECT. 2. *And be it further enacted*, That no ship or vessel, arriving in any of the said ports or places of the United States, and having on board any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman of the United States, or seamen, natives of countries beyond the Cape of Good Hope, as aforesaid, shall be admitted to an entry. And if any such negro, mulatto, or other person of colour, shall be landed from on board any ship, or vessel, in any of the ports or places aforesaid, or on the coast of any state prohibiting the admission or importation as aforesaid, the said ship or vessel, together with her tackle, apparel, and furniture, shall be forfeited to the United States, and one half of the net proceeds of the sales on such forfeiture shall inure, and be paid over, to such person or persons, on whose information the seizure on such forfeiture shall be made.

SECT. 3. *And be it further enacted*, That it shall be the duty of the collectors, and other officers of the customs, and all other officers of the revenue of the United States, in the several ports or places situated as aforesaid, to notice, and be governed by, the provisions of the laws now existing, in the several states, prohibiting the admission or importation of any negro, mulatto, or other person of colour, as aforesaid. And they are hereby enjoined vigilantly to carry into effect the said laws of said states, conformably to the provisions of this act; any law of the United States to the contrary notwithstanding. Act of February 28th, 1803, ch. 63.]—[*Brockenbrough's Note.*]

or brought, any negro, mulatto, or any person of colour, &c." There are nice shades or gradations in language, which are more readily perceived than described, and the mind impressed with a particular idea, readily employs those words which express it most appropriately. Words which have a direct and common meaning, may also be used in a less common sense, but we do not understand them in the less common sense, unless the context, or the clear design of the person using them, requires them to be so understood. Now the verbs, "to import," or "to bring in," seem to me to indicate, and are most commonly employed as indicating, the action of a person on any thing, animate or inanimate, which is itself passive. The agent, or those who are concerned in the agency or importation, are not, in common language, said to be imported or brought in. It is true that a vessel coming into port, is the vehicle which brings in her crew, but *we do not in common language say, that the mariners are "imported," or brought in by a particular vessel; we rather say they bring in the vessel. So, too, if the legislature intended to punish the captain of a vessel, for employing seamen of a particular description, or for allowing these seamen to come on shore, we should expect that this intention would be expressed by more appropriate words, than "to import" or "bring in." These words are peculiarly applicable to persons not concerned in navigating the vessel. It is not probable, then, that in making this provision, a regulation respecting the crew of a vessel was in the mind of congress. But it is contended, on the part of the prosecution, that the succeeding words of the sentence, exempting certain descriptions of persons from the general prohibition, show that the prohibition itself was intended to comprehend the crew, as well as those who did not belong to the vessel. Those words are, "not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope."

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That this limitation, proves the prohibition to have been intended to comprehend freemen, as well as slaves, must, I think, be admitted. But it does not follow, that it was, also, intended

to comprehend the crew of a vessel, actually employed in her navigation, and not put on board, in fraud of the law. A person of colour, who is a registered seaman of the United States, may be imported, or brought into the United States, in a vessel in which he is not employed as a mariner. The construction, therefore, which would extend the prohibitory part of the sentence, to the crew of the vessel, in consequence of the language of the exception, is not a necessary construction, though I must admit, that it derives much strength from that language.

The forfeiture of the vessel is not, in this section of the act, but I have noticed its construction, because it is not reasonable to suppose, that it was intended to forfeit a vessel for an act which was not prohibited. The second section enacts, "that no ship or vessel, arriving in any of the said ports or places of the United States, and *having on board* any negro, mulatto, or
*436 * other person of colour, not being a native, a citizen, or registered seaman of the United States; or seamen, natives of countries beyond the Cape of Good Hope, as aforesaid, shall be admitted to an entry."

It is obvious, that this clause was intended to refuse an entry to every vessel, which had violated the prohibition contained in the first section; and that the words, "having on board" were used, as co-extensive with the words "import," or "bring." We had, at that time, a treaty with the Emperor of Morocco, and with several other Barbary powers. Their subjects are all people of colour. It is true, they are not so engaged in commerce, as to send ships abroad. But the arrival of a Moorish vessel in our ports, is not an impossibility; and can it be believed, that this law was intended to refuse an entry to such a vessel? It may be said, that an occurrence which has never taken place, and which, in all probability, never will take place, was not in the mind of congress; and, consequently the omission to provide for it, ought not to influence the construction of their acts. But there are many nations, with whom we have regular commerce, who employ coloured seamen. Could it be intended by congress, to refuse an entry to a French, a Spanish, an English, or a Portuguese merchant vessel, in whose crew there

was a man of colour? I think this construction could never be given to the act. The words, "*having on board* a negro, mulatto, or other person of colour" would not, I think, be, applied to a vessel, one of whose crew was a person of colour.

The section then proceeds: "And if any such negro, &c., shall be landed from on board any ship or vessel, &c., the said ship or vessel, &c., shall be forfeited."

"The words, "shall be landed," seem peculiarly applicable to a person, or thing, which is imported, or *brought in*, and which is landed, not by its own act, but by the authority of the importer, not to a mariner, going on shore voluntarily, or on the business of the ship. The words, "*such* negro," &c., refer to the preceding passages, describing those whom a captain of a vessel is forbidden to import, and whose being on board a vessel

*437 *excludes such vessel from an entry, and no others. If, then, the commentary, which has been made on those passages, is correct, the forfeiture is not incurred by a person of colour, coming in as part of a ship's crew, and going on shore.

Although the powers of Barbary, do not send merchant ships across the Atlantic, yet their treaties with us, contemplate the possibility of their cruizers entering our ports. Would the cruizer be forfeited, should one of the crew come on shore?

I have contended, that the power of congress to regulate commerce, comprehends, necessarily, a power over navigation, and warrants every act of national sovereignty, which any other sovereign nation may exercise over vessels, foreign or domestic, which enter our ports. But there is a portion of this power, so far as respects foreign vessels, which it is unusual for any nation to exercise, and the exercise of which would be deemed an unfriendly interference with the just rights of foreign powers. An example of this would be, an attempt to regulate the manner in which a foreign vessel should be navigated in order to be admitted into our ports; and to subject such vessel to forfeiture, if not so navigated. I will not say, that this is beyond the power of a government, but I will say, that no act ought to have this effect given to it, unless the words be such as to admit of no other rational construction.

I will now take some notice of that part of the act which has a reference to the state law.

The language, both of the Constitution and of the act of congress, shows, that the forfeiture was not intended to be inflicted in any case but where the state law was violated. In addition to the words, in the first and second sections of the act, which confine its operation to importations, into "a state which, by law, has prohibited, or shall prohibit, the importation of such negro," &c.; the third section enjoins it on the officers of the United States, in the states having laws containing such prohibition, "to notice and be governed by the provisions of the laws, now existing, of the several states, prohibiting the admission or importation of any negro, mulatto, or any person of *colour, as aforesaid." This is not inflicting a penalty for the violation of a state law, but is limiting the operation of the penal law of the United States, by a temporary demarcation given in the Constitution. The power of congress to prevent migration or importation, was not to be exercised prior to the year 1808, on any person whom any of the states might think proper to admit. All were admissible who were not prohibited. It was proper, therefore, that the act of congress should make the prohibitory act of the state, the limit of its own operation. The act of congress does not, necessarily, extend to every object comprehended in the state law, but neither its terms, nor the Constitution, will permit it to be extended farther than the state law.

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The first section of the act "to prevent the migration of free negroes and mulattoes" [1] into this commonwealth, prohibits their coming voluntarily or being imported. The second section imposes a penalty on any master of a vessel, who shall bring any free negro or mulatto. The third section provides, that "the act shall not extend to any masters of vessels, who shall bring into this state any free negro or mulatto, employed on board, and belonging to such vessel, and who shall therewith depart." The act, then, does not prohibit the master of a

[1] See 1 Revised Code of Virginia of 1819, § 64, 65, 66, ch. cxi., p. 437-8.—[*Brockenbrough's Note.*]

vessel, navigated by free negroes or mulattoes, from coming into port, and setting only part of the crew on shore, provided they depart with the vessel. The state prohibition, then, does not commence, until the vessel departs without the negro or mulatto seaman. No probability, however strong, that the vessel will depart without the seaman, can extend the act to such a case, until the vessel has actually departed. If this be true, neither does the act of congress extend to such a case.

But this is not all. The act of assembly prohibits the admission of free negroes and mulattos only, not of other persons of colour. Other persons of colour were admissible into Virginia.

*439 * The act of congress makes a clear distinction between free negroes, and mulattos, and other persons of colour. But so much of the act of congress, as respects other persons of colour, does not apply to Virginia, because such persons were admissible into this state.

The libel charges the sailors landed, to have been persons of colour, not negroes or mulattos. If, under this libel it were allowable to prove, that the sailors landed, were, in fact, negroes or mulattos, it is not proved. Mr. Bush does not prove, that any were landed, but says, that those discharged were "of different colours and nations." Andrew Johnson says, "that on the 29th of October, *the people of colour* received their prize tickets, went on shore, and, of course, took their own discharge."

There is, then, no evidence, that these people were negroes or mulattos. Upon these grounds, I am of opinion, that no forfeiture of the vessel has been incurred, and that so much of the sentence as condemns the brig *Wilson*, ought to be reversed and restitution awarded.

The United States *v.* Maurice.

NOTE.

This opinion was delivered by Marshall sitting as Circuit Judge, and deals largely with the power of appointment vested under the Constitution in the President. As an exposition of the constitutional doctrines of appointment it is undoubted law, but another aspect of the case is more notable. The defendant Maurice who had been appointed by the government agent of fortifications had failed to account for some forty thousand dollars which came into his hands, and in this suit by the government to enforce payment from the sureties on his official bond the defence was set up that he had never been legally appointed to the office. Marshall decided that this was true, but unimportant, inasmuch as the power of the United States to enter into the bond of indemnity was a clearly constitutional exercise of its power to enter into contracts to carry out its other powers —an implication necessary from the very creation of the government. The same doctrine soon after received the approval of the Supreme Court in *United States* v. *Tingey*, 5 Peters Rep., 115, and in many other cases.

The facts of the case are fully stated in the opinion.

The United States

v.

Maurice *et al.*

[2 Brockenbrough's Reports, 96.]

May Term, 1823.

MARSHALL, C. J., delivered the following opinion, containing a full narrative of the facts and pleadings in the cause :

This is an action of debt brought upon a bond executed on the eighteenth day of August, 1818, in the penalty of twenty thousand dollars, with the following condition : "Whereas the said James Maurice has been appointed agent for fortifications on the part of the United States, now, therefore, if the said James Maurice shall truly and faithfully execute and discharge all the duties appertaining to the said office of agent, as aforesaid, then the above obligation to be void, &c." The breach assigned in the declaration is, that large sums of money came to the hands of the said Maurice, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for, a part of which, namely, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse to the use of the United States, or account for ; wherefore, &c.

The defendants, the sureties in the said obligation, prayed oyer of the bond, and of the condition, and then demurred to the declaration. The plaintiff joined in the demurrer.

The defendants also pleaded several pleas, on some of which * issue has been made up, and on others, demurrer has been joined.

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The first point to be considered is the demurrer to the declaration.

The defendants insist that the declaration cannot be sustained, because the bond is void in law, it being taken for the performance of duties of an office, which office has no legal existence, and consequently, no legal duties. No violation of duty, it is said, can take place, when no duty exists.

Since the demurrer admits all the facts alleged in the declaration, which are properly charged, and denies that those facts create any obligation in law, it must be taken as true that James Maurice was in fact appointed an agent of fortification on the part of the United States; that he received large sums of money in virtue of that appointment, and has failed to apply it to the purpose for which he received it, or to account for it to the United States.

As the securities certainly intended to undertake that Maurice should perform the very acts which he has failed to perform, and as the money of the nation has come into his hands on the faith of this undertaking, it is the duty of the Court to hold them responsible, to the extent of this undertaking, unless the law shall plainly interpose its protecting power for their relief, upon the principle that the bond creates no legal obligation. Is this such a bond? The first step in this inquiry, is the character of the bond. Does it, on its face, purport to be a mere official bond, or to be in the nature of a contract? This question is to be answered by a reference to the terms in which its condition is expressed. These leave no shadow of doubt on the mind. The condition refers to no contract—states no undertaking to perform any specific act—refers to nothing—describes nothing which the obligor was bound to do, except to perform the duties of an officer. It recites that he was appointed to an office, and declares that the obligation is to be void if he "shall truly and faithfully execute and discharge all the duties * appertaining to the said office." Of the nature of those duties no information whatever is given. Whether the disbursement of public money does or does not constitute a part of them, is a subject on which the instrument is entirely silent.

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The bond, then, is, on its face, completely an official bond, given, not for the performance of any contract, but for the performance of the duties of an office, which duties were known, and had been prescribed by law, or by persons authorized to prescribe them.

In his declaration, the attorney for the United States has necessarily taken up this idea, and proceeded on it. In his assignment of breaches, he states that the said James Maurice had been appointed agent of fortifications, and alleges that he had not performed the duties of the said office, nor kept the condition of his bond, but that the said condition is broken in this, that while he held and remained in the said office, divers large sums of money came to his hands, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for; a part of which, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse or account for. On this breach of his official duty, which is alleged to constitute a breach of the condition of his bond, the action is founded. No allusion is made to any other circumstance whatever as giving cause of action.

The suit then is plainly prosecuted for a violation of the duty of office, which is alleged to constitute a breach of an official bond. The Court must, on this demurrer, at least, so consider it, and must decide it according to those rules which govern cases of this description. This being a suit upon an official bond, the condition of which binds the obligors only that the officer should perform the duties of his office, it would seem that the obligation could be only co-extensive with these duties. What is their extent? The defendants contend that no such office exists; that James Maurice was never an officer, and, of consequence, was never bound by this bond to the performance of any duty whatever.

* 100 * To estimate the weight of this objection, it becomes necessary to examine the Constitution of the United States, and the acts of Congress in relation to this subject.

The Constitution, art. 2, sec. 2, declares, that the President "shall nominate, and, by and with the advice and consent of the

Senate, shall appoint ambassadors, &c.," "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause. If the relative "*which*," refers to the word "appointments," that word is referred to in a sense rather different from that in which it had been used. It is used to signify the act of placing a man in office, and referred to as signifying the office itself. Considering this relative as referring to the word "offices," which word, if not expressed, must be understood, it is not perfectly clear whether the words "which" offices "shall be established by law," are to be construed as ordaining, that all offices of the United States shall be established by law, or merely as limiting the previous general words to such offices as shall be established by law. Understood in the first sense, this clause makes a general provision, that the President shall nominate, and by and with the consent of the Senate, appoint to all offices of the United States, with such exceptions only as are made in the Constitution; and that all offices (with the same exceptions) shall be established by law. Understood in the last sense, this general provision comprehends those offices only which might be established by law, leaving it in the power of the executive, or of those who might be entrusted with the execution of the laws, to create in all laws of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices.

I do not know whether this question has ever occurred to the legislative or executive of the United States, nor how it may have been decided. In this ignorance of the course which may have been pursued by the government, I shall adopt the

*101 * first interpretation, because I think it accords best with the general spirit of the Constitution, which seems to have arranged the creation of office among legislative powers, and because, too, this construction is, I think, sustained by the subsequent words of the same clause, and by the third clause of the same section.

The sentence which follows, and forms an exception to the general provision which had been made, authorizes Congress "by law to vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." This sentence, I think, indicates an opinion in the framers of the Constitution, that they had provided for all cases of offices.

The third section empowers the President "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

This power is not confined to vacancies which may happen in offices created by law. If the convention supposed that the President might create an office, and fill it originally without the consent of the Senate, that consent would not be required for filling up a vacancy in the same office.

The Constitution then is understood to declare, that all offices of the United States, except in cases where the Constitution itself may otherwise provide, shall be established by law.

Has the office of agent of fortifications been established by law?

From the year 1794 to the year 1808, Congress passed several acts, empowering the President to erect fortifications, and appropriating large sums of money to enable him to carry these acts into execution. No system for their execution has ever been organized by law. The legislature seems to have left this subject to the discretion of the executive. The President was, consequently, at liberty to employ any means which the Constitution and laws of the United States placed under his control. He might, it is presumed, employ detachments from the army,

*102 * or he might execute the work by contract, in all the various forms which contracts can assume. Might he organize a corps, consisting of labourers, managers, paymasters, providers, &c., with distinct departments of duty, prescribed and defined by the executive, and with such fixed compensation as might be annexed to the various parts of the service. If this mode of executing the law be consistent with

the Constitution, there is nothing in the law itself to restrain the President from adopting it. But the general language of the law must be limited by the Constitution, and must be construed to empower the President to employ those means only which are constitutional. According to the construction given in this opinion to the second section of the second article of that instrument, it directs that all offices of the United States shall be established by law: and I do not think that the mere direction that a thing shall be done, without prescribing the mode of doing it, can be fairly construed into the establishment of an office for the purpose, if the object can be effected without one. It is not necessary, or even a fair inference from such an act, that Congress intended it should be executed through the medium of offices, since there are other ampler means by which it may be executed, and since the practice of the government has been for the legislature, wherever this mode of executing an act was intended, to organize a system by law, and either to create the several laws expressly, or to authorize the President, in terms, to employ such persons as he might think proper, for the performance of particular services.

If, then, the agent of fortifications be an officer of the United States, in the sense in which that term is used in the Constitution, his office ought to be established by law, and cannot be considered as having been established by the acts empowering the President, generally, to cause fortifications to be constructed.

Is the agent of fortifications an officer of the United States? An office is defined to be "a public charge or employment," and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of
* *103* * the United States. Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without

any contract defining them, if those duties continue, though the person be changed ; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.

If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured.

The army regulations are referred to in acts of Congress, passed previous and subsequent to the execution of the bond under consideration. A copy of those regulations, purporting to be a revisal made in the war office, in September, 1816, conformably to the act of the 24th of April, 1816, has been laid before the Court, and referred to by both parties. These regulations provide for the appointment, and define the duties of the agents of fortifications.

They are to be governed by the orders of the engineer department in the disbursement of the money placed in their hands. They are to provide the materials and workmen deemed necessary for the fortifications; and they are to pay the labourers employed. In the performance of these duties they are directed to make out, first, an "abstract of articles purchased;" secondly, "an abstract of labour performed;" thirdly, an "abstract of pay of mechanics;" and fourthly, "an abstract of contingent expenses."

These duties are those of a purchasing quartermaster, commissary, and paymaster. These are important duties. A very superficial examination of the laws will be sufficient to show,
* 104 * that duties of this description, if not performed by contract, are performed by persons who are considered as officers of the United States, whose offices are established by law.

If, then, we look at the bond and declaration, we find in both every characteristic of an office bond. If we look at the army regulations, the only additional source of information within our reach, we find the duties of an agent of fortifications to be such

as would make him an officer of the United States. Is the office established by law? The permanent agents mentioned in the act of March 3d, 1809 (ch. 19, sec. 3), are those who are appointed, "either for the purpose of making contracts or for the purchase of supplies, or for the disbursement, in any other manner, of moneys, for the use of the military establishment of the United States." If this act authorizes the appointment of such agents, and virtually establishes their offices, it cannot, I think, in correct construction, be extended to other persons than those who are employed in some manner in disbursing money "for the use of the military establishment or navy of the United States." "The military establishment" is a term which seems to be well defined in the acts of Congress, and to be well understood, and I do not think the act can be construed to comprehend an agent of fortifications.

In the act of March 3d, 1817, ch. 517, sec 5, it is made the duty of the secretary of war "to prepare general regulations, better defining and prescribing the respective duties and powers in the adjutant-general, inspector-general, quartermaster-general, and commissary of ordinance, department of the topographical engineers, of the aids of generals, and generally of the general and regimental staff; which regulations, when approved by the President of the United States, shall be respected and obeyed, until altered or revoked by the same authority."

The exclusive object of this section is, I think, the regulation of existing offices. I do not think it can be fairly construed to extend to the establishment of offices. Yet if under this act, subordinate agencies or offices have in fact been introduced, such offices may be established by subsequent acts of Congress.

*105 * The act of April 24th, 1816, "for organizing the general staff, and making farther provision for the army of the United States," sec. 9, enacts, "that the regulations in force before the reduction of the army, be recognised, as far as the same shall be found applicable to the service, subject, however, to such alterations as the secretary of war may adopt, with the approbation of the President."

A legislative recognition of the actually existing regulations of the army must be understood as giving to those regulations the

sanction of the law; and the subsequent words of the sentence authorize the secretary of war to alter those regulations with the approbation of the President. Such alterations have also the sanction of the act of 1816.

This subject appears to have been taken up by the secretary. A pamphlet entitled, "Army Regulations Revised, conformably to the Act of 24th of April, 1816," has been laid before the Court as authentic, and has been appealed to by both plaintiff and defendants, as being the same regulations which are approved and adopted by the act of the 2d of March, 1821, sec. 13.

These regulations direct the appointment of agents of fortifications, and define their duties. They purport to have been revised in the war office, in September, 1816. If the provision they contain respecting agents of fortifications formed a part of the army regulations prior to the act of the 24th of April, 1816, it is recognized by that act. If that provision was first introduced in September, 1816, it is recognized by that act. If that provision was first introduced in September, 1816, it may, if approved by the President, be considered as an alteration authorized by that act. The question whether this alteration has been approved by the President, is perhaps a question of fact, not examinable on this demurrer.

When I consider the act of the 24th of April, 1816, and this revisal in the war office, in connexion with the act of the 2d of March, 1821, adopting the revisal of September, 1816, under the name of general regulations of the army, compiled by Major General Scott (for they are represented as being the same
*106 *regulations), I feel much difficulty in saying that the office of agent of fortifications was not established by law when this bond was executed. I am more inclined to give this opinion, because I am persuaded this cause must be carried before a tribunal which can make that certain which was before uncertain; and because, by overruling the demurrer to the declaration, the other questions of law which occur in the cause, and which would be arrested by sustaining the demurrer to the declaration, will all be brought before the Supreme Court.

The defendants pleaded several pleas to the declaration. The

second plea is, that the defendant, James Maurice, performed the condition of his bond up to the 26th day of September, 1820, on which day a new bond was executed, in pursuance of the act of the 15th of May, 1820, "providing for the better organization of the treasury department." The plaintiff takes issue on that part of the plea which alleges performance up to the 26th day of September, 1820, and demurs to the residue.—The act under which this new bond was executed, gives a new and summary remedy against officers of the United States who had received public money for which they had failed to account, and against their sureties, and contains a proviso: "That the summary process herein directed, shall not affect any surety of any officer of the United States who became bound to the United States before the passing of this act; but each and every such officer shall, on or before the thirtieth day of September next, give new and sufficient sureties for the performance of the duties required of such officer." The defendants contend that this new and sufficient bond was a substitute for the old one, and discharged the sureties to the original obligation, so far as respects subsequent transactions.

The plaintiff contends that the bond is cumulative, and that the sureties to the first obligation continue bound for any subsequent as well as any preceding default of the officer.

There is certainly no express declaration of the act on this subject; and if the second bond operates a discharge of the first, this effect is produced by implication only: yet the implication is very strong in favour of the construction.

*107 *The sole object of the law is to obtain sureties against whom the new and summary remedy it gives might be used. To obtain additional security, does not appear to be one of the motives for which it was passed. The direction that the sureties should be "new" and "sufficient," countenances the opinion that they were solely relied on for the subsequent transactions of the officer. If no additional security was intended to be demanded; if the sole object of the law was to coerce the giving of sureties, against whom this new remedy, by distress, might be used, it seems reasonable to think that the legislature supposed the new sureties alone responsible for the

subsequent conduct of their officer. It could not escape the consideration of the legislature, that the same friends who became bound in the first bond, might probably become bound in the second, thinking themselves discharged from the first. But friends may be willing to become bound in a penalty within their resources, or to an amount to which the officer can secure them, and very unwilling to become bound in double that sum. The officer may be able to give security in a penalty of $25,000. and totally unable to give security for $50,000. The government fixes the penalty in which an officer shall give bond and sureties, and is regulated, in fixing that penalty, by all the considerations which belong to the subject. It ought not to be considered as augmenting that penalty, unless the means used for augmenting it are plain, direct, and intelligible. In this case, if the same sureties execute the new bond, they are liable to a double penalty, by an act not clearly understood to have that effect. If there are new sureties to the new bond, the attention of the old sureties may be diverted from watching the conduct of the officer, and they may even be induced to relinquish liens on property, in order to enable the officer to find his new sureties.

If the course of legislation on the subject has been such as to furnish to the original sureties reasonable ground for the opinion that they were discharged from all liability for the subsequent conduct of the officer, and reasonable ground for the implication that such was the intention of the legislature, and I
*108 * think it has, such ought to be the construction of the act. This demurrer, therefore, is overruled.

The fifth plea is, that James Maurice was never legally appointed, but was, on the 1st day of August, 1818, appointed by the secretary of war, agent of fortifications for Norfolk, Hampton Roads, and the lower part of the Chesapeake Bay, without any provisions of law whatever, authorizing and empowering him to make such appointment, and directly contrary to an act entitled, an act, &c., passed the 3d of March, 1809.

To this plea there is a demurrer.

The first question arising on this demurrer, respects the validity of this appointment, made by the secretary of war. It is too

clear, I think, for controversy, that appointments to office can be made by heads of department, in those cases only which Congress has authorized by law; and I know of no law which has authorized the secretary of war to make this appointment. There is certainly no statute which directly and expressly confers the power; and the army regulations, which are exhibited as having been adopted by Congress, in the act of the 2d of March, 1821, declares that agents shall be appointed, but not that they shall be appointed by the secretary of war. If this mode of appointment formed a part of the regulations previous to the revision of September, 1816, that is a fact which might or might not be noticed if averred in the pleadings. The Court is not informed of its existence by this demurrer. It must therefore be supposed not to exist, and James Maurice cannot be considered as a regularly appointed agent of fortifications.

This brings us to the question in the cause on which I have felt, and still continue to feel, great difficulty. The appointment of James Maurice having been irregular, is this bond absolutely void, or may it be sustained as a contract entered into by a person not legally an officer, to perform certain duties belonging to an office? If the office had no existence, it has been already stated, that a bond to perform its duties generally, could create no obligation, but since the office does exist, the condition * refers to something certain by which the nature and extent of the undertaking of the obligor may determined. It is an undertaking that James Maurice shall perform the duties appertaining to the office of agent of fortifications: and this undertaking is in the nature of contract. If this contract does not bind the parties according to its expressed extent, its failure must be ascribed to some legal defect or vice inherent in the instrument. It is contended that the bond is void, because there is an inability on the part of the United States to make any contract not previously directed by statute.

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The United States is a government, and, consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by

the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institutions. It will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished, is contract; the government, therefore, is capable of contracting, and its contracts may be made in the name of the United States.

The government acts by its agents, but it is neither usual nor necessary to express, in those contracts which merely acknowledge the obligation of an individual to the United States, the name of the agent who was employed in making it. His authority is acknowledged by the individual when he executes the contract, and is acknowledged by the United States when the government asserts any right under that contract. I do not mean to say that there exists any estoppel on either party; I only mean to say that a contract executed by an individual, and received by the government, is *prima facie* evidence that it was entered into between proper parties. So with respect to the subject of the contract.

*110 *Without entering on the inquiry respecting the limits which may circumscribe the capacity of the United States to contract, I venture to say that it is co-extensive with the duties and powers of government. Every contract which subserves to the performance of a duty, may be rightfully made.

The Constitution, which has vested the whole legislative powers of the Union in Congress, has declared that the President "shall take care that the laws be faithfully executed." The manner in which a law shall be executed does not always form a part of it; a power, not limited or regulated by the words of the acts, has been given by the legislature to the executive, to construct fortifications; and large sums of money have been appropriated to the object. It is not and cannot be denied, that these laws might have been carried into execution by means of contract; yet, there is no act of Congress, expressly authorizing the executive

to make any contract in the case. It is useless, and would be tedious, to multiply examples, but many might be given to illustrate the truth of the proposition. It follows, as a necessary consequence, that the duty, and of course the right, to make contracts may flow from an act of Congress, which does not in terms prescribe this duty; the proposition then is true, that there is a power to contract in every case where it is necessary to the execution of a public duty.

*111 * It remains to inquire, whether it be indispensable to the validity of a contract, that it should express the circumstances under which it was made, so precisely and distinctly, as to show the motives which induced it, and the objects to be effected by it. This certainly is often done, and in many cases conduces to a clear understanding of the intention of the parties, and of the obligations which the instrument creates; but it is not universally practised, would be often inconvenient, and is necessary, I think, only so far as may be requisite to explain the nature of the contract. We know too well that persons entrusted with the public money, are often defaulters. It is not, I believe, doubted, that the law raises an assumpsit to pay the money which the defaulter owes. An overpayment is sometimes made by mistake; is not the receiver liable to the United States? Yet, there is no act of Congress creating the assumpsit in either case. I presume it will not be denied, that a declaration charging that the defendant was indebted to the United States, for

*112 money had and received to their use, and that being *so indebted, he assumed and promised to pay it, would be sufficient without setting forth at large all the circumstances of the character in which, and the objects for which, the money was received. If the law would raise an implied assumpsit, which would be binding, I cannot conceive that an express assumpsit would be less so; nor can I conceive that such express assumpsit, more than the implied assumpsit, need detail the various circumstances on which its validity might depend. These would be matter of evidence. In any case where an assumpsit would be valid, the government may certainly take a bond, and I perceive no reason why sureties may not also be demanded.

It is the duty of the government to collect debts due to it, however they may have accrued; it results from this duty that the means of securing and collecting the public money may be used. Sureties may therefore be required to the bond demanded from the debtor; the instrument itself is an admission that it is given for a debt, and it is contrary to all our received opinions to require, that it should show how the debt was contracted. Any thing which destroys its validity may, undoubtedly, be shown in pleading; but a bond given to the United States, is, I think, *prima facie* evidence of debt, and would be sustained on demurrer.

So if money be committed to the care of any person for a legitimate object, bond and security on the same principle may be required, with condition that he shall account for it. The jurisdiction of a limited court must undoubtedly appear on the record; but I do not think that the same rule applies to contracts. Infants, femes covert, idiots, and persons under duress, are not bound by their contracts. But their disability must be shown by pleading, and it need not appear in any contract that the parties to it are not liable to these disabilities. Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid consideration, and to be obligatory, if the parties be ostensibly able, until the contrary is shown; and the same rule applies to a government which is capable of making contracts.

* 113 *2. It is also contended that this bond is void, because it is entered into on a consideration which is either forbidden by express law, or contrary to the general policy of the law.

The plea refers to the act passed on the 3d of March, 1809, "to amend the several acts for the establishment and regulation of the treasury, war, and navy departments." I have already said, that I do not consider the prohibition of this act as comprehending agents of fortifications, because they do not belong to the military establishment, nor do their employments relate to it. It is unnecessary to enter into any argument in support of this opinion, because it is of no importance to the point under consideration. The effect, if the act applied to the office, would be to show that

the appointment of James Maurice to the office of agent of fortifications was not legal — and that effect is produced by the construction I have given to the Constitution. I consider the appointment of James Maurice to the office of agent of fortifications, by the secretary of war, as invalid ; but the question, is the bond void on that account? still remains to be considered. It was undoubtedly intended as an office bond, and was given in the confidence that James Maurice was legally appointed to office. If the suit was instituted to punish him for the neglect of duty, in the nature of non-user, or for any other failure, which could be attributed in any degree to the illegality of his appointment, I should be much disposed to think the plea a bar to the action. But this suit is brought to recover the money of the United States which came to the hands of James Maurice, in virtue of his supposed office, and which he has neither applied to the purpose for which he received it, nor returned to the treasury. In such a case, neither James Maurice, nor those who undertook for him, can claim any thing more than positive law affords them.

The plea does not controvert, but must be understood to confess the material facts charged in the declaration. It must be understood to confess that the money of the United States came to the hands of James Maurice as agent of fortifications ; that it was the duty of such agent to disburse it for the use of the

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* United States, in the manner prescribed by the army regulations, or to account for it ; that he has failed to do either, and that they were bound for him in this respect. Admitting these things, they say it is a bar to the action brought for the money, that his appointment was illegal.

If the bond contained no reference to the appointment of James Maurice, as agent of fortifications ; if its condition stated only, that certain sums of money had been delivered to him to be disbursed under the discretion of the principal engineer, in the purchase of materials for fortifications, and in the payment of labourers, its obligation, I presume, would not be questioned. It would be a contract which the United States might lawfully make. If, instead of specifying the particular purposes for which the money was received, the condition of a bond refers to

a paper which does specify those purposes, I know of no principle of reason or of law, which varies the obligation of the instrument from what it would be, if containing that specification within itself. That is certain which may be rendered certain, and an undertaking to perform the duties prescribed in a distinct contract, or in a law, or in any other known paper prescribing those duties is equivalent to an enumeration of those duties in the body of the contract itself.

This obligation is an undertaking to perform the duties appertaining to the office of agent of fortifications. Those duties were prescribed in the army regulations, and were such as any individual might lawfully undertake to perform. The plea does not allege that the thing to be done was unlawful, nor does it allege that the illegality of the appointment to office constituted any impediment to a performance of the condition of the bond. Were it even improper to disburse the money received in the manner intended by the contract, it could not be improper to return it. There can be nothing unlawful in the engagement to return it. The obligation to return it, as in every other case of money advanced by mistake, is one, which, independent of all express contract, would be created by the law itself. So far as respects the receiver himself, he would be bound by law * to return the money not disbursed, and if he would be so bound, why may not others be bound with him for his doing that, which law and justice oblige him to do?

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Admitting the appointment to be irregular, to be contrary to the law and its policy, what is to be the consequence of this irregularity? Does it absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? Does it authorize him to apply money so received to his own use? If the policy of the law condemns such appointments, does it also condemn the payment of moneys received under them? Had this subject been brought before the legislature, and the opinion be there entertained that such appointments were illegal, what would have been the probable course? The secretary of war might have been censured; an attempt might have been

authorized to make him ultimately responsible for the money advanced under the illegal appointment; but is it credible that the bond would be declared void? Would this have been the policy of those who make the law? Let the course of Congress in another case answer this question.

It is declared to be unlawful for any member of Congress to be concerned in any contract made on the part of the United States, and all such contracts are declared to be void. What is the consequence of violating this law, and making a contract against its express provisions? A fine is imposed on its violator, but does he keep the money received under the contract? Far from it. The law directs that the money so received shall be forthwith repaid, and in case of refusal or delay, "every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law, for the recovery of any such sum or sums of money advanced as aforesaid." If, then, this appointment be contrary to the policy of the law, the repayment of the money under it is not, and a suit may, I think, be sustained, to coerce such repayment on the bond given for that purpose.

* *116* * The cases cited by the defendants, do not, I think, support the plea.

Collins v. *Blantern*, 2 Wilson, 341, was a bond given, the consideration of which was illegal. It was to compound a prosecution for a criminal offence. It was to induce a witness not to appear and give testimony against a person charged with the commission of a crime. The court determined that the bond was void, and that the illegal consideration might be averred in the plea, though not appearing in the condition. It is only wonderful that this could ever have been doubted.

The case of *Paxton* v. *Popham*, 9 East, 408, and the case of *Pole* v. *Harrobin*, reported in a note in page 416 of the same volume, are both cases in which bonds were given for the payment of money for the performance of an act which was contrary to law. These cases differ in principle from that at bar. The bond was not given to induce the illegal appointment, or for any purpose in itself unlawful. The appointment had been made, and the object of the bond was to secure the regular disburse-

ment of, or otherwise accounting for, public money advanced for a lawful purpose. The bond was not then unlawful, though the appointment was.

The case of *Nares and Pepys* v. *Rolles*, 14 East, 510, was a suit on a bond given by a collector and his sureties, for the due collection and payment to the receiver-general, of certain duties assessed under an act of parliament. The duties were collected, but not paid to the receiver-general; in consequence of which, the collector was displaced, and suit brought against one of the sureties in the bond. The defence was, that the duties were not in law demandable, and this defence was founded on an ambiguity in the language of the act. The argument turned chiefly on the words of the statute, but the counsel for the plaintiffs contended also, that supposing the act not to impose the taxes, yet the bond would not be void, for such a security might well be taken, that the duties which were actually collected should not be lost, but might be preserved, to be paid *over to those who should be found ultimately entitled to receive the money. It was competent for him to enter into a bond to pay over voluntary payments made to him, although he might not have been able to enforce payment of the rates, from those who might refuse.

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In answer to this argument, it was said, that unless the act gave authority to assess and collect the duties, he was no collector, and could not be subject to any obligation for not paying money over to the plaintiffs, in that character, which was obtained by extortion.

The Court seemed inclined to this opinion, but determined that the taxes were imposed and assessed according to law, and therefore gave judgment for the plaintiffs.

The impression which may, at the first blush, be made by this case, will be effaced by an attentive consideration of it. If the money collected was not due by law, the plaintiffs could have no right to receive it, and had, consequently, no cause of action against the defendant. The money sued for was not their money, but the money of the individuals from whom it had been unlawfully collected. The bond to collect and pay over this money to

the receiver-general, was a bond to do an unlawful act. The contract would have been clearly against law. In giving his opinion on the subject, the chief justice said: "Looking at the condition of this bond, as it appears upon the record, I cannot say that if the rates were collected without any authority, the collector could be called upon to pay them over, because he would be answerable to the individuals from whom he had received the money, and would be entitled to retain it for his own indemnity."

The case at bar is, in principle, entirely different from that of *Nares and Pepys* v. *Rolles*. This is not money obtained illegally from others, and, therefore, returnable to them, but is the money of the United States, drawn out of the treasury. The person holding it is not entitled "to retain it for his own indemnity," against the claims of others, for there are no others who can claim it. The justice of the case requires, I think, very

* *118* * clearly, that the defendants should be liable to the extent of their undertaking, and I do not think the principles of law discharge them from it.

I am therefore of opinion that the demurrer to this plea ought to be sustained, and that judgment on it be rendered for the plaintiffs.

Bank of the United States *v.* M'Kenzie.

NOTE.

This case was decided by Marshall as Circuit Judge, and is mainly of interest because of its relation to certain earlier cases in the Supreme Court where Marshall had sharply limited certain powers of the states. Here the same arguments were neatly turned against the Bank of the United States.

In this case an action was brought by the Bank of the United States against Donald M'Kenzie of Virginia on a promissory note. M'Kenzie pleaded that the statute of limitations had run on his obligation, the Bank replied that it was a body corporate established by Congress and resident in Pennsylvania where its stockholders were resident ; the defendant M'Kenzie rejoined that the Bank continuously operated a branch in Virginia where the note in question was received by the Bank ; the Bank demurred; and the question then arose as to the validity of the plea of the statute on the facts stated. In the course of the argument for the Bank it was urged that, inasmuch as the United States was a stockholder of the Bank, the principle that the statute of limitations did not run against the sovereign took the claim out of the operation of the statute. The difficulty was that the Supreme Court in *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat., 904 (and *supra*), had already denied that very exemption to the Georgia Bank when the state of Georgia was a stockholder, on the ground that that incident of sovereignty had been waived by the sovereign in so far as it took part in the transactions of a private business, and that case, as Marshall decided, was a clear authority against the Bank of the United States in the present case. If the sovereign state of Georgia had waived its privilege so had the United States.

The Bank of the United States

v.

M'Kenzie.

[2 Brockenbrough's Reports, 393.]

Before Hon. John Marshall, Chief Justice of the United States.

Virginia, May Term, 1829.

THIS was an action on the case, brought by the president, directors, and company, of the Bank of the United States, against Donald M'Kenzie, a citizen of Virginia, to recover the amount of a negotiable note, made by Michael W. Hancock, and endorsed by M'Kenzie. The note was for $4000, and was discounted at the branch bank of the United States, at Richmond, and was regularly protested for non-payment on the 26th day of December, 1821. This suit was brought in 1828. The defendant pleaded the act of limitations.

The plaintiffs replied "that they ought not, &c. to be barred &c. because the plaintiffs are, and were at the time of the accrual of their action, a body corporate, duly constituted as such by an act of Congress, &c., and by the said act so constituting them a body corporate with full capacity to sue and be sued as such, their said corporation was *fixed and established in the state of Pennsylvania*, beyond the limits of the state of Virginia, &c., and the president and directors thereof *were, and are, citizens of the state of Pennsylvania*, &c., and this they are ready to verify, &c."

The defendant rejoined that at the time of the accrual of the plaintiffs' cause of action, the plaintiffs "had, and ever since have had, and yet have, an office of discount and deposit lawfully established at Richmond, in the state of Virginia, aforesaid, committed to the management and direction of managers or directors, annually and every year appointed, &c., which said managers or directors of the said office of discount and deposit at Richmond, have always been members, stockholders, and joint corporators of the said company of the Bank of the * United States, and have always been citizens of the United States, and residents and inhabitants of the state of Virginia; and the said defendant in fact avers, that the said promissory note, &c. was transferred and assigned to the said plaintiffs in the course of dealings of the said Michael W. Hancock, with the plaintiffs' said office of discount and deposit at Richmond, &c. And this he is ready to verify, &c. wherefore, &c."

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The plaintiffs demurred to the defendant's rejoinder, and the defendant joined in demurrer. Upon this demurrer, the following opinion was delivered by

MARSHALL, C. J.—The demurrer in this case makes the question, whether the plea of the act of limitations is a bar to the action? The fourth section of the act for limitation of actions, is copied from the English statute on the same subject, and enacts that "all actions of trespass, &c." "shall be commenced and sued within the time and limitation hereafter expressed, and not after, that is to say, the said actions upon the case other than that for slander," "within five years next after the cause of such action or suit, and not after."

It has been observed by English judges, and if the observation had never been made, the truth would be obvious to all, that if the act had contained no other clause than this, it would have barred every action it enumerated, whatever might be the character or condition of the plaintiff. It would have barred the rights of infants, *femes covert*, persons *non compos*, or beyond the sea, as well as of corporations. The enacting clause does not contemplate the *character* of the plaintiff, but looks singly to the

action itself. This being an action on the case, is within the enacting clause of the statute, and must be barred by it, unless the plaintiff can be brought within the exception.

The twelfth section provides, "that if any person or persons, that is or shall be entitled to any such action of trespass, &c. be, or shall be, at the time of such action given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non* **compos mentis*, imprisoned, beyond the seas, or out of the country, that then, such person or persons, shall be at liberty to bring the same actions, so as they take the same within such times as are before limited," after such disability shall be removed.

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The counsel for the plaintiff contends,

1. That this section limits the words of the enacting clause, so as to restrain them from operating on debts due to corporations.

2. That if this be against him, then the plaintiff is within the saving of the exception.

The argument in support of the first point, is substantially this. A corporation aggregate is not liable to any of the disabilities which are enumerated in the twelfth section; not even to that of being beyond sea, because being a mere legal entity, being entirely incorporeal, it can have no place of residence. Since it cannot be brought within the twelfth section, it ought not to be comprehended in the enactment of the fourth, because the savings of the statute must be construed to extend to every description of persons, who are the objects of the enacting clause.

This argument is, I think, anticipated and answered in the observation made on the words of the fourth section. They do not take into view the character of the plaintiff, but of the action. In construing this section, it is entirely unimportant, by whom the suit is brought. The action is equally barred by length of time, whoever may be the plaintiff. The plain words of the statute are decisive. Nor does any reason of justice or policy exist, which should take a corporation out of these words. The legislature could have no motive for limiting the time, within which a suit

should be brought by an individual, which does not apply with equal force to a suit brought by a corporation.

We find no words in the exception, intimating the intention to make it co-extensive with the enacting clause, or to limit the general provision of the enacting clause to such general classes of persons, as may furnish individuals for whom justice would require the saving of rights, which are found in the twelfth section. An exception is not co-extensive with the provisions from which it forms the exception; and if a corporation cannot be brought within any of the savings of the statute, the inference is, not that a corporation is withdrawn from the enacting clause, but that the legislature did not think it a being whose right to sue, required a prolongation beyond the legal time, given for suitors generally.

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2. The proposition that the plaintiffs are within the saving of the rights of persons out of the country, is one of more difficulty, which requires more consideration.

The enacting clause, it has been said, looks to the action only. The proviso which gives further time to those whose particular situation was supposed by the legislature to require it, looks to persons only. Its language is, "if any person or persons, that is, or shall be entitled to any such action, be, or shall be, at the time of any such cause of action given or accrued, within the age of twenty-one years," &c. "that then, such person, or persons, shall be at liberty to bring the same actions, &c."

The plaintiff, to come within the letter of the exception, must be considered as a person or persons. This, a corporation aggregate, in its capacity as a body politic, in which alone it acts, cannot be; but the statute of Virginia, is taken almost verbatim from the English statute, and, therefore, the construction which has prevailed in England, may be considered as adopted with the words, on which that construction was made. Long before the statute of Virginia was enacted, the courts of England had extended the construction of this very section, so as to embrace cases within its equity, though not within its words. This decision was not, indeed, made in a case relating to the character of the plaintiff, but in one relating to the character of the cause,

which does not stand on stronger reason. In *Chandler* v. *Vilett*, 2 Wms. Saunders, 117, *f*, it was decided that an action on the case, came within the equity of the saving of the statute, though it is omitted in the enumeration of actions to * which that saving applied. The twelfth section of the act of Virginia, likewise omits this action; but I have no doubt that the courts of the state, would so construe that section, as to bring that action within it. The question, I believe, has never been raised, although the occasion for raising it, has frequently occurred. Upon this principle of liberal construction, I think, the twelfth section ought to be extended, so as to comprehend in its provisions, any plaintiff actually affected by the impediments it recites. If, then, the present plaintiff really comes within the equity of the twelfth section, I should be much inclined to allow him its benefits; but if the plaintiff claims the advantage allowed to persons, there is some reason for subjecting him to the consequences resulting from the character in which those advantages are claimed.

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The plaintiff, is a corporate body, acting by the name and style, of the President, Directors & Company of the Bank of the United States, and consisting of the original subscribers to the said Bank, or their assignees. The president and directors, are to be stockholders, and are to be elected annually at the banking-house, in the city of Philadelphia, at which place, they are to carry on the operations of the said Bank. They are authorized to establish offices of discount and deposit, wherever they may think fit, and to commit the management of the said offices, and the business thereof, to such persons, and under such regulations, as they may think proper. The president and directors, transacting the business of the bank at Philadelphia, * have, in pursuance of the power given in the Charter, established an office of discount and deposit, at Richmond, to transact the business of the Bank at that place. At this office, as at every other, the whole business is necessarily conducted in the name of the corporation, and the president and directors of this office, as at every other, are as much the agents of the corporation, as the president and directors doing business

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at Philadelphia. The president and directors, at Philadelphia, are neither the nominal nor real plaintiffs. The nominal plaintiffs, are the President, Directors and Company; the real plaintiffs, are all the Stockholders. The president and directors transact so much of the business of the company, as is proper for them, at their banking-house, in Philadelphia; but so much of the business of the company as is proper for the president and directors of the office at Richmond, is transacted at their banking house, in Richmond. The contract, on which the present suit is founded, was made with the company, acting by its agents in Richmond.

To bring the plaintiff within the letter, or the spirit of the saving in the twelfth section, locality must be given to the corporation. A place of residence must be assigned to it, and that place of residence, must be out of the commonwealth of Virginia.

The counsel for the plaintiff contends, that the corporation resides in Philadelphia. How is this to be sustained? The corporate body consists of all the stockholders, and acts by a name, comprehending all the stockholders. These stockholders reside all over the United States; but being in their corporate capacity, in which alone they act, a mere legal entity, invisible, inaudible, incorporeal, they act by agents. It may be well doubted, and is doubted, whether the residence of these agents, or their place of doing business, can fix the residence of the corporation. If it can, these agents are divided into distinct bodies, residing in different states, and doing business at distinct places, in those different states. The banking-house of the president and directors of the office at Richmond, is as fixed and as notorious, as the banking-house at Philadelphia. The agents of the company, acting at Richmond, are as notoriously, and as completely its agents, as those who act at Philadelphia. If, then, * the residence of the corporate body is fixed and ascertained, by the residence of its agents, or their place of doing business, it resides in Richmond, as truly as in Philadelphia. So far as respects this particular contract, it may, with entire propriety, be said to reside in Richmond. The contract was made

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here, with agents who reside here, at a banking-house established here, and is to be performed at this place. In equity and in reason, the plaintiff cannot, I think, as to this contract, if as to any, be placed in Philadelphia.

When it is recollected that we resort to the equity of the statute to bring the plaintiff or the action on the case within the terms of the operation of the twelfth section, the reason is, I think, the stronger for considering this case as excluded from it, and within the enacting clause.

The case of the *Bank of the United States* v. *Deveaux et al*, 5 Cr. 61; (2 Cond. Rep. Sup. Ct. U. S. 189) decides this case, in principle. In that case, the court determined that it might look behind, or through the name of the corporation, and see the individuals who were the actual plaintiffs who constituted that legal entity, in whose name the corporation acted. It is very much under the sanction of that decision, that the plaintiff is brought within the twelfth section of the act; and that decision makes the plaintiff a resident of every place where any member of the corporation resides. However difficult it might be to apply the principle of that case in reason and in justice to a contract made by an individual residing and sued in a state where no office or banking-house existed, and where a straggling corporator was to be found, no difficulty can exist in applying it to a case like this, where a suit is brought in the state in which the contract was made, in which it was to be performed, and in which the agents and members of the corporation with whom the debt was contracted, and to whom it was to be paid resided.

The plaintiff also insists, that the act does not apply to this case, because the United States, being a member of the corporation, is a party plaintiff.

This argument has, I think, been fully met at the bar by the
* 401 * counsel for the defendant. In support of the argument urged at the bar, some decisions made by the supreme court, may, I think, be urged. It may well be doubted, on the authority of these cases, whether the privileges, the prerogative, if I may use the term, of the United States, as a sovereign, belong to a case in which it does not appear in its

sovereign capacity. In the *Postmaster General* v. *Early*, 12 Wheat. 136 (6 Cond. Rep. Sup. Ct. U. S. 480) the jurisdiction of the court was denied by counsel, although the suit was brought for a debt confessedly due to the United States. It was sustained, because in the opinion of the judges, it was given by an act of Congress. If jurisdiction could not be maintained without an act of Congress, much difficulty would certainly be felt in applying the prerogative of government to such a suit, so as to withdraw the bar of the statute of limitations.

In the case of *The Bank* v. *Deveaux et al.*, it was not even alleged that the United States was a party, because a member of the corporation, and that jurisdiction could be taken on that ground.

In *The Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheat. 904 (5 Cond. Rep. Sup. Ct. U. S. 794), the defendant pleaded to the jurisdiction of the court, because the state of Georgia was a corporator. The judges of the circuit court being divided on the question, it was referred to the supreme court. In this case, the question, whether a sovereign, becoming a member of a trading corporation, carries its sovereign prerogatives with it, was brought directly before the court. The court said:—"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an * interest in banks, are not suable even in their own courts, yet, they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty; it acts merely as a corporator, and exercises no

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other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

"The government of the Union, held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by, or against the bank, in the sense of the Constitution; so with respect to the present bank. Suits brought by or against it, are not understood to be brought by, or against the United States. The government by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the Charter."

This case has, I think, fully decided the question, whether any prerogative of the United States, is imparted to the Bank.

In *The Bank of Kentucky* v. *Wister et al.*, 2 Peters, 318, it appeared that the state of Kentucky was the sole proprietor of the stock of the Bank, yet, it was determined by the court, that the case was decided by the case of the *Planters' Bank of Georgia* in 9 Wheat.

This point, then, is completely settled, as I think, in the supreme court.

The law is for the defendant, and judgment is to be given for him.

Ex Parte Randolph.

NOTE.

The petitioner, Randolph, was acting purser of the United States frigate *Constitution*. In accordance with a statute of the United States, "An act to provide for the better Organization of the Treasury Department," passed May 15, 1820, his accounts were settled by the Treasury Department and on a shortage found, a warrant was issued in accordance with the statute, and he was imprisoned. He then brought this petition for a writ of *habeas corpus* before Marshall and Barbour, sitting as Circuit Judges. It appeared that his accounts had been settled and then resettled, and this warrant was issued to enforce the collection of the deficit on the resettled account. It was urged that the act of Congress was unconstitutional, mainly in that it conferred judicial powers on the Treasury Department instead of on the United States courts.

The rather vague opinion by Barbour, J., in favor of the discharge of the delinquent purser—in which Marshall concurred—goes mainly on the ground that there is no power in the act to allow a warrant on a resettlement of the account.

Marshall's opinion goes on two grounds: first, that Randolph was not an officer included in the statute of 1820, since he was a temporary purser; second, that the summary process of the statute was applicable only to sums actually due, and not applicable in Randolph's case where the warrant was issued for an erroneous amount. Both opinions hint at the unconstitutionality of the act.

In *Murrays Lessee et al* v. *Hoboken Land and Improvement Co.*, 18 Howard (U. S.), 272, the constitutionality of this same act was upheld in a vigorous and learned opinion of the Supreme Court by Justice Curtis, setting at rest the doubts suggested by Marshall, and declaring the procedure of the act due process of law. *Ex parte Randolph* was not there cited.

Ex parte Robert B. Randolph.

[2 Brockenbrough's Reports, 475.]

BEFORE

Hon. JOHN MARSHALL, Chief Justice of the United States.
Hon. PHILIP P. BARBOUR, District Judge.

Virginia, November Term, 1833.

MARSHALL, C. J.—Robert B. Randolph, late acting purser of the frigate *Constitution*, was brought into court, on a writ of * *habeas corpus*, and a motion is now made for his discharge from imprisonment.

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The writ was directed to the marshal of this district, in whose custody he is. The return of the officer, shows the cause of caption and detention, to be a warrant issued by the accounting officers of the treasury, under authority of the act passed the 15th day of May, 1820; which, after reciting that Robert B. Randolph, late acting purser of the United States frigate *Constitution*, stands indebted to the United States in the sum of $25,097.83, agreeably to the settlement of his account, made by the proper accounting officers of the treasury, and has failed to pay it over according to the "act for the better organization of the treasury department," commands the said marshal to make the said sum of $25,097.83 out of the goods and chattels of the said Randolph; and in default thereof, to commit his body to prison, there to remain until discharged by due course of law. If these proceedings fail to produce the said sum of money, the warrant is to be satisfied out of his lands and tenements.

The return shows that the body of the said Robert B. Randolph was committed to prison, and is detained by virtue of this process.

Several objections have been taken to the legality of the warrant; the first and most important of which is, that the act of Congress, under the authority of which it issued, is repugnant to the Constitution of the United States. If this objection be sustained, the warrant can certainly convey no authority to the officer who has executed it, and the imprisonment of Mr. Randolph is unlawful.

The counsel of the prisoner rely on several parts of the Constitution, which they suppose to have been violated by the act in question. The first section of the third article, which establishes the judicial department, and the seventh amendment, which secures the trial by jury in suits at common law, are particularly selected as having been most obviously violated.

No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality *of a legislative act. If they become indispensably necessary to the case, the Court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.

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The act of Congress, under the authority of which the process by which Mr. Randolph is imprisoned was issued, makes it the duty of certain officers of the treasury to settle, and cause to be stated, the account of any collector of the revenue, &c., who shall fail to render his account, or pay over the same in the manner, or in the time required by law, exhibiting truly the amount due to the United States, and certifying the same to the agent of the treasury, who is authorized, and required to issue a warrant of distress against such delinquent officer and his sureties, directed to the marshal of the district in which such delinquent officer and his surety, or sureties shall reside; which officer is commanded to make good the money appearing to be due to the United States, by seizing, and selling the goods and chattels of such delinquent officer and his sureties, and by committing the body of such delinquent officer to prison, there to remain until discharged by due course of law.

If this ascertainment of the sum due to the government, and this issuing of process to levy the sum so ascertained to be due,

be the exercise of any part of the judicial power of the United States, the law which directs it, is plainly a violation of the first section of the third article of the Constitution, which declares, that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress shall from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour." The judicial power extends to "controversies to which the United States shall be a party."

The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and established by Congress, nor do they hold offices during good behaviour. Their offices are held
*480 * at the pleasure of the President of the United States. They are, consequently, incapable of exercising any portion of the judicial power, and the act which attempts to confer it, is absolutely void. In considering the validity of this act, therefore, it is necessary to discard every idea of its conferring judicial power. We must not view the statement or certificate of the account as a judgment, or the warrant which coerces payment, as judicial process. They must be viewed as mere ministerial acts performed by mere ministerial agents. They cannot be otherwise sustained.

I will, for the present assume, that the power of collecting taxes, and of disbursing the money of the public, may authorize the legislature to enact laws by which the agents of the executive may be empowered to settle the accounts of all receiving and disbursing officers, and to issue process in the nature of an execution, to compel the payment of any sum alleged to be due. But these agents are purely ministerial, and their acts are, necessarily, to be treated only as ministerial acts. The inevitable consequence is, that their validity must be decided by those legal principles which govern all acts of this character. These require, that the authority, whether given by a legislative act, or otherwise, must be strictly pursued. Such agents cannot act on other persons, or on other subjects, than those marked out

in the power, nor can they proceed in a manner different from that it prescribes.

This is a general rule, applicable to such cases generally ; it applies with peculiar force to that now before the Court.

I will not attempt to detail the severities and the oppression which may follow in the train of this law, if executed in contested cases. They have been brought into full view by counsel, in their arguments, and I will not again present them. It may be said with confidence, that the legislature has not passed any act which ought, in its construction, to be more strictly confined to its letter. By this rule its words will be examined.

The first objection to this warrant is, that Mr. Randolph is not one of those persons on whom the law was designed to operate.

* 481 * The act does not declare that every debtor of the public shall be subject to the summary process. The particular persons against whom it may be used are enumerated. Those stated in the second section are, "any collector of the revenue, receiver of the public money, or any other officer who shall have received the public money, before it is paid into the treasury of the United States." The obvious construction of these words is, I think, that they describe persons who hold offices under government, to whose hands the public money comes before it reaches the treasury. A collector of the revenue is an officer of this description ; so is a receiver of the public money ; and the following words, "or other officer who shall have received the public money before it is paid into the treasury of the United States," demonstrated the kind of persons who were in the mind of the legislature. The subsequent words preserve the idea, that regularly appointed officers only were intended. The word officer, is retained, and is regularly used throughout the section, showing plainly, that no other debtor than one who was properly designated by the term officer, was contemplated by the act. Throughout the section, too, the sureties of such officer are regularly connected with him, and subjected to the same process, so far as respects their property. I do not mean to say, that the liability of the officer is made to depend on his having actually

executed an official bond with sureties. I do not mean to say that an officer, regularly appointed, who should receive the money of the public before the execution of his bond, might not be liable to this treasury execution. But I mean to say, that this language proves incontestably that the legislature contemplated those officers only, who were required to give bond with surety, as the objects of the law. The sureties are spoken of throughout, as inseparable from the officer, as existing whenever the officer exists.

This section does not comprehend the case of a purser in the navy, but I have thought it necessary to enter into its exposition; because it has a material bearing on the third section, which does comprehend persons of that description.

*482 * The third section enacts, "that if any officer employed, or who has been heretofore employed in the civil, military, or naval departments of the government, to disburse the public money appropriated to the service of these departments, shall fail to render his accounts, or to pay over in the manner, and in the time required by law, or the regulations of the department to which he is accountable, any sum of money remaining in the hands of such officer, it shall be the duty," &c.

To what persons does the word officer, as used in this section, apply? Is it to every commissioned officer in the army or navy of the United States, to whose hands any public money may be intrusted, or is it to those officers only, whose regular duty it is to receive and disburse the public money, and who are appointed for that purpose? The language of the sentence, I think, answers these questions to a reasonable certainty. It is "any officer employed to disburse the public money appropriated to the service of these departments respectively." A military or naval officer is employed for military or naval duties, not to disburse the public money appropriated to the service of his department. I cannot suppose, that a military or naval officer to whose hands, money belonging to the public may come, is, from the words of the act, more liable to this summary and severe proceeding, than any individual not bearing a commission, to whom the same money might be confided for similar purposes. The subsequent

words of the sentence, "shall fail to render his accounts, or to pay over in the manner and in the time required by law, or the regulations of the department to which he is accountable," &c., also convey the idea that a regular disbursing officer, whose duty was prescribed by law, or by the regulations of the department, was contemplated. This idea is still more strongly supported by that part of the section which adopts all the provisions of the second section, and applies them to the sureties of the officer who is designated by the act, as well as to the officer himself. I think, then, the fair construction of the law is, that regularly appointed officers who are required to give official bonds, were alone * contemplated by the legislature. If we take into consideration the character and operation of the act, the extreme severity of its provisions, that it departs entirely from the ordinary course of judicial proceeding, and prescribes an extreme remedy, which is placed under the absolute control of a mere ministerial officer, that in such a case the ancient established rule is in favour of a strict construction; my own judgment is satisfied that this is the true construction.

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Was Mr. Randolph an officer of this description?

The process, by authority of which he is in prison, designates him as "Robert B. Randolph, late acting purser of the United States frigate *Constitution*." The word acting, qualifies the word purser, and shows that he did not hold that office under a regular appointment, but for the time being, during the existing emergency. The omission to include his sureties in the warrant, as the law directs, shows that he had given no sureties; and this fact, unexplained, is evidence that no official bond, with sureties, was required. It might be added, that the explanatory accounts, to some of which reference is made in the warrant, prove with sufficient clearness that Mr. Timberlake was purser of the frigate *Constitution*, then cruising in the Mediterranean, and that on his death, Lieutenant Randolph was directed to perform the duties of purser during the cruise. It is then apparent, that he was a mere acting, and not a regular purser.

Mr. Nicholas has contended, with much plausibility, that having taken upon himself the office, he takes upon himself also

all its responsibilities. This argument is true to a certain extent, and, as far as respects responsibility alone, is unanswerable. In a regular proceeding against Mr. Randolph, no person will be hardy enough to deny his responsibility to the same extent as if he had been a regular purser.

It is not his responsibility to the United States, but his liability to this particular process, which is the subject of inquiry. Is a mere acting purser designated by this law as one of those officers against whom this summary process may be used? It is *in vain to say that he comes within the same reason, and is within the mischief against which the statute intended to provide. The statute does not reach all public debtors, and has selected especially those for which it is intended. No others can be brought within its purview. Those principles of strict construction, which apply, I think, to all laws restrictive of common right, forbid it.

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These reasons satisfy my own judgment, that Mr. Randolph was not an officer to whom the law applies the process under which he is imprisoned.

If it were necessary to assign any reasons for this distinction between temporary and permanent officers, it would not be difficult to find them. The permanent officer usually receives his money from the treasury, or by its order, so that the document which charges him, appears on the books of that department. The temporary officer will seldom be placed under the same circumstances. He may, and generally does, receive the money with which he is chargeable, in such a manner as to leave the amount a subject of controversy. In this particular case, Purser Timberlake must stand charged, I presume, with all the moneys advanced to the purser of the *Constitution*. The portion of this money which came to the hands of Mr. Randolph, would not appear on those books, and may be a matter of controversy between him and Timberlake's representatives. Congress might very reasonably make a distinction, when giving this summary process, between an officer whose whole liability ought to appear on the books of the department, and an agent whose liability was most generally to be ascertained by extrinsic testimony.

But it is enough for me, that the law, in my judgment, makes the distinction.

The accounts extracted from the books of the treasury, and laid before the Court, furnish other matter for serious consideration.

The second section of the act requires, that the account stated by order of the first comptroller of the treasury, "shall exhibit *truly* the amount due to the United States." For what
*485 purpose * was the word *truly* introduced? Surely not to prohibit the officers of the government from exhibiting an account known to be erroneous. Congress could not suspect such an atrocity. Its introduction, then, indicates the idea, that this summary process was to be used only when the true amount was certainly known to the department; when the sum of money debited to the officer appeared certain, and either no credits were claimed, or none about which a controversy existed. The amount due to the United States cannot be truly exhibited when the claim is shown by the account itself, to exceed what is really due. I do not mean to say, that the debtor is not bound to show with precision, the credits to which he is entitled. I do not mean to say how far his failure to separate payments made from his own funds, and from those of his predecessor, may deprive him in a suit at law, of the credits he claims. I mean to say, only, that the amount claimed is not the sum *truly* due to the United States, if the account itself, shows that a smaller amount is due. The necessity of withholding the credit, may justify proceeding against the debtor in a court of justice, in which he must make good his credits; but will not, I think, justify issuing an execution, without any judicial inquiry, against the body and estate of the delinquent, for a sum confessedly more than is due.

The third section omits the word *truly*, but requires that the account shall be stated, and directs the agent of the treasury to proceed in the manner directed in the preceding section, all the provisions of which, are declared to be applicable to every officer of government, chargeable with the disbursement of public money.

It may be contended, that the provisions of the preceding section, thus adopted in the third, are those only, which relate to proceedings after the account is stated. But I do not think this the fair construction of the statute. I think the legislature can no more have intended in the one case than in the other, that a treasury execution should issue for confessedly more than is due, by which the person of the debtor should be imprisoned, * probably interminably, and his property sold. Con- *486 gress must have designed to leave such cases to the regular course of law.

If these principles be correct, let them be applied to the case before the Court.

Mr. Randolph is charged in the account on which the warrant issued, with cash left by Purser Timberlake, on board the frigate *Constitution*, and, according to his own confession, received by him, $11,483.

That he must account for this sum is certain. I shall not inquire now, whether the treasury might issue an execution for it or ought to have applied to a court of justice. I will proceed to other items of the account.

He is re-charged with slops issued by him, which belong to the estate of Mr. Timberlake, as appeared by his books.

Is this to be settled at the treasury, under this act of Congress, or does the inquiry properly belong to a court of justice?

He is charged with German linen, belonging to his private stores, which he turned into the navy store at Charleston, as slops. This item had been allowed to him on a former settlement of his accounts. It is not alleged that this linen has been returned to him. The United States may, and probably have, used it. Whether he is entitled to any, and to what credit, for this item, is a proper inquiry for a court of justice. The treasury may refuse the credit and refer the question to a court of justice, but cannot, I think, issue an execution for it, as the case now stands.

The material item allowed in a former settlement of accounts and now re-charged, is the amount of advances on his pay-roll to officers and men, while he acted as purser of the *Constitution*, it now appearing by the memoranda of sales, by the evidence of

Commodore Patterson, and others, and by the general state of the account, that portions of these advances were made out of the money and stores of purser Timberlake, and out of the ship's stores.

I will not make the obvious objection to this item, that if Mr. Randolph paid the money, or sold the stores of Mr. Timberlake *487 *on his own account, he is responsible to the estate of Mr. Timberlake, and that the treasury department of the United States does not represent him, nor that credits given for money paid by Mr. Randolph as his own, cannot be rescinded by alleging that the money really belonged to another person; nor will I inquire by what authority the treasury department settles the accounts between Timberlake's representatives, and Randolph. But I will say, that this entry admits, that part of the money was paid by Randolph out of his own funds, and certainly diminished his debt to the United States to that amount. Consequently, the whole amount for which execution issued was not due.

If I am correct in saying that this summary process can be used only to coerce the payment of the sum actually due, not to coerce the payment of more than is due, that such controverted question ought to be decided in a court of justice; then this warrant has been issued in a case which the law does not authorize; in a case which ought to have been submitted to a court of justice.

On both these points I am of opinion, that the agent of the treasury has exceeded the authority given by law, and consequently that the imprisonment is illegal.

I have not had time to state my opinion on the remaining point on which my brother judge has given his opinion. It is of no importance, as I concur with him on it.

Mr. Randolph is to be discharged from custody.

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